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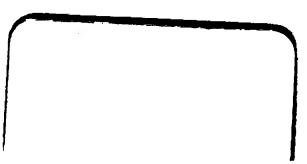

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SUMMARY

OF THE LAW OF

BILLS OF EXCHANGE,

CASH BILLS,

AND

PROMISSORY NOTES.

BY SIR JOHN BAYLEY, KNT.

ONE OF THE JUSTICES OF HIS MAJESTY'S COURT OF KING'S BENCH.

SECOND AMERICAN

FROM THE FIFTH LONDON EDITION.

EDITED BY FRANCIS BAYLEY,

OF LINCOLN'S INN ESQ., BARRISTER AT LAW.

WITH NOTES AND REFERENCES TO AMERICAN AND RECENT ENGLISH DECISIONS,

BY WILLARD PHILLIPS AND SAMUEL E. SEWALL.

BOSTON:

HILLIARD, GRAY, & COMPANY.

1836.

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TO

THIS EDITION.

THE present edition of this treatise is taken from the last London edition. Sir John Bayley's well known talents and learning, and reputation as a lawyer and a judge, are a sufficient recommendation of the work, which is the fruit of his long experience, accumulated knowledge, and matured judgment. His statements of cases are remarkably concise and complete; he distinguishes the decided points with great accuracy, and lays down general doctrines comprehensively, and at the same time with clearness and precision, so that his work, while it is acceptable and useful to lawyers, may be easily understood and safely followed by others.

A part of the chapter on stamps is omitted, as are also several of the British statutes which were inserted at large in the London edition.

The recent English decisions, as well as the American cases, have been referred to, or inserted in this edition. As some of these cases embrace new points, the insertion of them rendered it necessary to make corresponding additions to the text,

where they could be made without interrupting the connexion. The additions are included in brackets.

It will be seen that a very large portion of the text, and a still larger proportion of the notes in this volume, are the fruits of American jurisprudence. The editors have, with much labor, collected cases on bills and notes from more than two hundred volumes of reports published since their former edition of the work. The number of American cases stated and cited now exceeds that of the English.

Boston, April 28, 1836.

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TO THE FIFTH LONDON EDITION.

Most of the new cases in this edition have been supplied by the Author; but, the Editor has made alterations and additions in various parts of the work, particularly in the Tenth Chapter, which he has nearly re-written.

Lincoln's Inn, 1839.

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A SUMMARY

OF THE

LAW OF BILLS OF EXCHANGE

AND

PROMISSORY NOTES.

CHAP. I.

SECT. 1. *What a Bill or Note is.*
2. *An Order or Promise.*
3. *In Writing.*
4. *For Payment of Money.*
5. *To what Amount.*
6. *Absolutely and at all Events.*
7. *Date.*
8. *Place of Making.*
9. *Place of Payment.*
9.* *Time of Payment.*
10. *Payee.*
11. *Signature.*
12. *Attestation.*
13. *Expressing Value received.*
14. *Memorandums upon.*
15. *Legal Obligation of a Bill or Note.*

A BILL of Exchange is a written order or request, and a Promissory Note a written promise, for the payment of money absolutely and at all events; the one owing its existence and privileges to the law and custom of merchants, the other to the 3d and 4th Anne, c. 9. (1)

(1) Before the statute of Queen Anne many attempts were made to put promissory notes on the footing of bills of exchange, but without success: vide Pearson v. Garrett, 4 Mod. 242. Clerke v. Martin, Lord

The person who makes a bill is called the Drawer, the person to whom it is addressed the Drawee, and the person in whose favor it is made the Payee.

Raym. 757. Salk. 129. Burton v. Souter, Lord Raym. 774. and Williams v. Cutting, Lord Raym. 825. Salk. 24. 7 Mod. 154. 11 Mod. 24. and see 4 Term Rep. 151, 152.

'By the 3d and 4th Anne, c. 9. § 1. Whereas it hath been held, that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or endorsable over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note is payable, cannot maintain an action by the custom of merchants against the person who first made and signed the same; and that any person to whom such note should be assigned, endorsed, or made payable, could not within the said custom of merchants maintain any action upon such note against the person who first drew and signed the same:' Therefore, to the intent to encourage trade and commerce, which will be much advanced, if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner: Be it enacted, that all notes in writing, that after the 1st day of May, in the year of our Lord 1705, shall be made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant or trader, who is usually intrusted by him, her or them, to sign such promissory notes for him, her or them, whereby such person or persons, body politic and corporate, his, her or their servant or agent as aforesaid, doth or shall promise to pay to any other person or persons, body politic and corporate, his, her or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politic and corporate, to whom the same is made payable, and also every such note payable to any person or persons, body politic and corporate, his, her or their order, shall be assignable or endorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person and persons, body politic and corporate, to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she or they might do, upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person or persons, body politic and corporate, who, or whose servant or agent as aforesaid, signed the same; and that any person or persons, body politic and corporate, to whom such note, that is payable to any person or persons, body politic and corporate, his, her or their order, is endorsed or assigned, or the money therein mentioned ordered to be paid by endorsement thereon, shall and may maintain his, her or their action for such sum of money, either against the person or persons, body politic and corporate, who, or whose servant or agent as aforesaid, signed such note, or against any of the persons who endorsed the same, in like manner as in cases of inland bills of exchange.

[Promissory Notes are negotiable in all the States. In some they have been made so by statutes similar to that of Anne, while in others the provisions of that act appear to have been received as law without

If the Drawee accept the bill, he is called the Acceptor.

The person who makes a note is called the Maker, and the person to whom it is payable, the Payee.

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any express statute upon the subject. But although notes are negotiable in all parts of the Union, so far as to enable an endorsee or assignee to maintain an action in his own name against the maker, yet in the States of Vermont, New Jersey, Pennsylvania, Virginia, Kentucky, and Missouri, endorsees have not in general the privileges of endorsees by the law merchant. In all those States in an action against the maker of a note by the endorsee or assignee, the defendant is allowed to offset all demands which he had against the original payee of the note before notice of the endorsement. In some of the above enumerated States an endorsee cannot sue a remote endorser, and in some he must sue the maker of the note, unless insolvent, before he can bring an action against the endorser, and in all of them he is under some disadvantages. However, in most of these States, the acts incorporating banks exempt the notes discounted at such banks, and in some cases those lodged in them for collection, from these inconveniences, and place such notes on the footing of bills of exchange. And in New Jersey when a note is expressed to be payable "without defalcation or discount," in an action upon it by the assignee, the defendant is not allowed to set off his demands against the assignor. A statute of Pennsylvania gives similar privileges to notes dated at Philadelphia, and expressed to be payable "without defalcation," or without set-off. See M'Cullough v. Houston, 1 Dall. 441. as to the law in Pennsylvania. And it has been decided in Pennsylvania, that the endorsee of a note made payable "without defalcation," though not dated at Philadelphia or discounted by a bank, to whom it had been passed for a valuable consideration in the course of business, in a suit against the maker, was not subject to the defence of a failure of the consideration for which the note was given by the maker to the payee. The ground of this decision was, that the words "without defalcation," were intended to guard "bona fide" holders against a defence of this kind, and ought to be given effect to; and that the statute did not forbid the makers of notes from entering into such a contract. Lewis v. Reeder, 9 Serg. & R. 193. See Yeaton v. the Bank of Alexandria, 5 Cranch 49, and other cases cited in a note to Ch. ix. post, as to the law in Virginia. See also Griffith's Annual Law Reg. Vols. 3 and 4. pp. 22, 48, 78, 116, 142, 224, 264, 362, 365, 403, 423, 467, 518, 585, 627, 670, 696, 796, 864, 943, 1006, 1068, 1139, 1300; Bowie v. Duvall, 1 Gill & Johns. 175.

In Vermont the maker of a note when sued by the endorsee is not allowed to offset notes of the payee which he has purchased, unless he has perfected his right of action against the payee, by giving him notice that he is the holder of the notes, previously to the transfer to the plaintiff. Parker v. Kendall, 3 Verm. R. 540.

When the maker of a note in Vermont, payable to A. or bearer, is sued by B. *as bearer*, the defendant cannot offset his demands against A., as the statute only gives the right of offset of claims against the payee, where the suit is by an endorsee. Parker v. Kendall, 3 Verm. R. 540.

See Bullitt v. Scribner 1 Ind. R. 14, and M'Carty v. Rhea, 1 Ind. R. 55, as to the law in Indiana; and Mason v. Wash. 1 Breese, 16; Thompson v. Armstrong, 1 Breese, 23; Lusk v. Cooke, 1 Breese, 310; and Bryan v. Prisnow, 1 Breese, 33, as to the law in Illinois.]

When a bill or note is endorsed, the person endorsing it is called the Endorser, the person to whom it is endorsed, the Endorsee.

A note while in the hands of the payee has this resemblance to a bill, that it is for the payment of money absolutely and at all events, and when transferred it is exactly similar to a bill of exchange. (2)

[A bill or note is not money.

Therefore where a statute required a certain sum to be paid in money by the stockholders in a corporation at the time of subscription, giving a promissory note for the amount by a subscriber was held not to be a compliance with the act. (*a*)]

Sect. 2. — No particular (3) words are necessary to make

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(2) In Heylin v. Adamson, Burr. 669, the question was whether the endorsee of a bill was bound to make a demand upon the drawer as the endorsee of a note must upon the maker, and per Lord Mansfield, "while a note continues in its original shape of a promise from one man to another, it bears no similitude to a bill; but when it is endorsed the resemblance begins; for then it is an order by the endorser upon the maker to pay the endorsee, which is the very definition of a bill; the endorser is the drawer, the maker of the note the acceptor; and the endorsee, the person to whom it is made payable; and all the authorities, and particularly Lord Hardwicke, in a case of Hamerton v. Mackarell, M. 10 Geo. II. put promissory notes on the same footing with bills of exchange." And in Brown v. Harraden, 4 Term Rep. 148, where the court decided that three days' grace should be allowed on promissory notes, Lord Kenyon observed, that the effect of the statute was, that notes were wholly to assume the shape of bills; and Buller J. added, that the cases cited in the argument showed clearly, that the Courts of Westminster had thought the analogy between bills and notes so strong, that the rules established with respect to the one ought also to prevail as to the other; that the language of the preamble of the Act was express, that it was the object of the legislature to put notes exactly on the same footing with bills, and that the enacting part pursued that intention. The same doctrine is to be found in Carlos v. Fancourt, 5 Term Rep. 482. Edie v. East India Company, Burr. 1224.

[(*a*) Leightly v. Susquehanna and Waterford Turnpike Co. 14 S. & R. 434.]

(3) D. Lord Raym. 1397. Str. 629. 8 Mod. 364.

Chadwick v. Allen, Str. 706. A note was in these words: "I do acknowledge that Sir Andrew Chadwick has delivered me all the bonds and notes, for which 400*l.* were paid him on account of Colonel Synge, and that Sir Andrew delivered me Major Graham's receipt and bill on me for 10*l.*, which 10*l.* and 15*l.* 5*s.* balance due to Sir Andrew I am still indebted, and do promise to pay," and upon demurrer to the declaration, the court held it a note within the statute.

a bill or note; but it must be a written order or promise which from the time of making it cannot be complied with or performed without the payment of money.

Thus an order or promise to (4) deliver, or that I. S. (5) shall receive, money, or to be (6) accountable or (7) responsible for it to him or order, is a good bill or note.

[And a writing which says, "Due I. S." a certain sum, "payable on demand," is a promissory note. (*a*)

So a receipt for a sum of money, "to be returned when called for," is a promissory note. (*b*)

And a promise "to pay, or cause to be paid," a sum of money, is a promissory note. (*c*)]

But a mere (8) acknowledgment of a debt without any promise to pay, is not a bill or note.

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(4) D. acc. Lord Raym. 1397.

(5) D. 8 Mod. 364.

(6) Morris v. Lea, Lord Raym. 1396. Str. 629. 8 Mod. 326. Plaintiff sued as endorsee upon a note by which the defendant promised to be accountable to A. or order for 100*l.* value received; and after verdict for the plaintiff it was insisted in arrest of judgment, that this was not a negotiable note; sed per cur., "no precise words are necessary to be used in a bill or note: 'Deliver such a sum' makes a good bill; by receiving the value the defendant becomes a debtor, and when he promises to be accountable for it to A. it is the same as a promise to pay to A. and it is the stronger, because it is to be accountable to A. or order; and it would be an odd construction to expound the word accountable, to give an account, when there may be several endorsees. Judgment for plaintiff."

(7) D. 8 Mod. 364.

[(*a*) Pepoon v. Stagg, 1 Nott & M'Cord, 102; Kimball v. Huntington, 10 Wend. 675.]

[(*b*) Woodfolk v. Leslie, 2 Nott & M'Cord, 585. The action in this case was "upon an instrument in writing, nearly in the words following, 'Received of Woodfolk four hundred dollars, to be returned when called for, — day of — 18—. *I. K. Leslie.*'" The affidavit to hold to bail, spoke of the claim as being on a *promissory note.* On a motion to discharge the bail, on the ground of a variance between the affidavit and the cause of action;—the motion was discharged, on the ground that it was properly described as a promissory note.]

[(*c*) Lovell v. Hill, 6 C. & P. 238.]

(8) Fisher v. Leslie, 1 Esp. N. P. C. 426. An unstamped slip of paper with "I. O. U. eight guineas," written upon it, and signed by the defendant, was offered in evidence under the money counts, and objected to as being either a promissory note or a receipt, and therefore requiring a stamp; but Lord Kenyon held that it was neither a promissory note nor a receipt, and received it in evidence. So Childers v. Boulnois, cor. Abbott C. J. March 1822. 1 Dowling's Nisi Prius, 8.

So in a written bargain for buying goods, a promise to pay the seller the price in a limited time, is not a promissory note. (9)

And a paper importing to desire payment as matter of favor, not as matter of right, is not a bill. (10)

A note was (11) in these words: "Borrowed of I. S. 50*l.* which I promise *not* to pay;" and per Lord Macclesfield, "the word *not* shall be rejected, for a man shall never say, I am a cheat and have defrauded."

An order to pay money will be a bill, though instead of the ordinary direction to the drawers, the word "*at*" be prefixed to their names. (12)

Two unstamped pieces of paper, with "I. O. U. 400*l.*" and "I. O. U. 250*l.*," signed by defendant, were offered in evidence, and objected to, as being either promissory notes or receipts, and therefore requiring stamps: but Abbott C. J. thought they were neither, and that he was bound to receive them, and they were received accordingly; but the jury found for defendant. But see Guy v. Harris, sittings after Easter Term, 1800, cor. Lord Eldon C. J. contrà, Chitty 243. n.

[So it is held, that an acknowledgment in writing, that a certain sum is due from the subscriber to A. B., "value received," cannot be declared on as a note, but that the consideration must be averred. Read v. Wheeler, 2 Yerger, 50.]

(9) Ellis v. Ellis, Gow, 216. An agreement was in these words: "I. R. E., do this day bargain and agree with my uncle, W. E., to give him 5*l.* for a cart for the use of my father; and do hereby promise and agree to pay him, the said W. E., without fail, in three weeks from the date hereof. R. E." Dated, &c. In an action upon this instrument it was insisted it was a promissory note, and required a note stamp: but Richardson J. held it an agreement, not a note.

(10) Little v. Slackford, 1 Moody & M. 171. Defendant gave J. S., to whom he was indebted, a note, addressed to plaintiff, as follows: "Mr. Little, please to let the bearer have 7*l.*, and place it to my account, and you will much oblige your humble servant, J. Slackford." Plaintiff paid the money, and sued defendant for money paid. He produced this paper: defendant insisted it was a bill of exchange, and required a stamp. Lord Tenterden held it no bill: it did not import to be a demand by a person having right to require, but rather seemed a request, as matter of favor, by one who had no right to demand.

(11) Cited per Lord Mansfield in Russell v. Langstaffe. B. R. M. 21 Geo. III. and in Peach v. Kay, sittings after Tr. 1781, and per Lord Hardwicke, 2 Atk. 32.

(12) Shuttleworth v. Stevens, 1 Campb. 407. In an action against defendant as drawer of a bill, the instrument was in this form: "Two months after date pay to the order of J. J. 78*l.* 11*s.* value received, T. S.—at Messrs. John Morson and Co." Lord Ellenborough held this was properly declared on as a bill of exchange, and plaintiff had a verdict.

Especially if from fraud it be written in such manner as to be intended to escape observation, and to make the instrument pass as a bill. (13)

Such an order is not a promissory note. (14)

An order will be a bill, though it be addressed, not to any particular person, but merely to a particular house; (15)

At least as against a person who accepts it. (15)

The order may be addressed to the person making it, in other words, a man may draw upon himself; but in legal operation it is rather a note than a bill. (16)

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(13) Allan v. Mawson, 4 Campb. 115. In an action against defendant as drawer of a bill, the instrument was as follows: "Two months after date pay L. H. or order 40*l.* value received, G. M. @ Jno. Perring and Co's." The "*at*" was in very small letters in the hook of the S. Plaintiff presented it for acceptance, and on refusal brought this action within the two months; the question was, whether plaintiff was entitled to treat this as a bill of exchange, and Gibbs C. J. thought he would have been on the authority of Shuttleworth v. Stevens, 1 Campb. 407. had the word "*at*" been distinctly written; but he left it to the jury whether it was not fraudulently written, to escape detection, and to induce a belief that the instrument was a bill; the jury thought it was, and found for plaintiff.

(14) Rex v. Hunter, Pasch. 1823. Prisoner was indicted for forging and uttering a promissory note, and the indictment set out the note as follows: "Newport, Nov. 20, 1821. Two months after date pay Mr. B. Hobday or order 28*l.* 15*s.* value received. Jno. Jones: At Messrs. Spooners and Co. bankers, London." After conviction, Holroyd J. stated a case for the consideration of the Judges, whether this was rightly called a promissory note: and on consideration five Judges out of seven who met, viz. Abbott C. J., Bayley, Park, Holroyd, and Burrough Js., held it a bill, not a note, Graham and Hullock Barons doubting; and a pardon was recommended.

(15) Gray v. Milner, 8 Taunt. 739. In an action against defendant as acceptor of a bill, the instrument was as follows: "May 20. 1813. Two months after date pay to me or my order the sum of 30*l.* 2*s.* W. S. Payable at No. 1. Wilmot Street, opposite the Lamb, Bethnal Green, London." Defendant accepted it, and plaintiff was endorsee: it was objected that this was not a bill; but on point saved, and time to consider, the Court were clear it was; that the direction to the place could only mean to some person who resided there, and defendant by his acceptance acknowledged that he was the person to whom it was directed. Judgment for plaintiff.

(16) Starke v. Cheeseman, Tr. 11 W. III. Carth. 509. Christopher Cheeseman being in Virginia, drew upon Christopher Cheeseman in Ratcliffe, which in truth was himself; and an action being brought against him upon the bill, he suffered judgment by default, without taking any objection on this ground, though he did upon others, and the plaintiff had judgment.

Dehers v. Harriot, Tr. 2 W. & M. 1 Show. 163. A. drew a bill

[A request to pay the amount of a note written underneath it, is a bill, and the drawee, after acceptance, may be sued on it. (*d*)]

Where an instrument is so framed as to admit of reasonable doubt whether it was intended for a bill or note, the holder may, as against the maker, treat it as either. (17)

And it is not competent for the maker to say the holder has done wrong. (17)

An instrument, which contains words of promise from the maker as though it were a note, is not the less so, because it has upon it the name and address of a third person in the place where the name and address of the drawee of a bill would be, and though such person afterwards write upon it what, if it were a bill, would be an acceptance; for, in its creation it is a note, and subsequent acts will not make it a bill. (17)

[An instrument in the following form, "On demand I promise to pay to A. or bearer the sum of 15*l.* for value received," addressed in the margin to C. D., but not signed by him, and

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payable by himself in Dublin; an action was afterwards brought thereon, and the plaintiff recovered.

Robinson v. Bland, Burr. 1077. The defendant, being at Paris, drew a bill for 672*l.* on himself in London; the consideration was partly money lost at play in Paris, and partly money lent at the time and place of play, and upon that ground a case was reserved for the opinion of the court; but no objection was made that the defendant drew the bill upon himself.

Joselyn v. Laserre, Fort. 282. A man may draw a bill upon himself. See also Mar. 3.

[(*d*) Leonard v. Mason, 1 Wend. 522.]

(17) Edis v. Bury, 6 Barn. and Cr. 433. an instrument was in these words: "London, 5th August, 1826. Three months after date I promise John Bury or order 44*l.* 11*s.* 5*d.* value received. "John Bury."

"J. B. Grutherot, 35. Mountague

"Place, Bedford Square."

Grutherot's name was written across it: in assumpsit for cattle sold, defendant proved that he gave this instrument to plaintiff for the price, and insisted that for want of notice of its dishonor it operated as payment. This depended upon the question whether this was a bill or note, and that point Lord T. saved: but on motion for nonsuit, the Court thought it a note; but they also held, that as against defendant who made it, if he made it in a doubtful form, plaintiff was at liberty to treat it either as a bill or note, and a rule was refused.

on which he writes the words "Accepted C. D." is a promissory note, and may be declared on as such. (*e*)

But an instrument in the form of a bill accepted by B., which was written to be signed by A. as drawer, is not a bill until signed by A. (*f*)

The order in a bill of exchange to the drawee, is not revoked by the death of the drawer. (*g*)]

Sect. 3.—Though a bill or note, or an endorsement thereon, must be in writing, such writing need not be in ink. (18)

A writing in pencil is sufficient. (18.)

Sect. 4.—Bills and notes must be for the payment of money only; an order or promise to pay money *and do some other act* is not a bill or (19) note.

[Thus an order by A. upon B., directing him to pay a certain

[(*e*) Block v. Bell, 1 Mood. & Rob. 149.]

[(*f*) Vyse v. Clarke, 5 C. & P. 403.]

[(*g*) Abbot, the master of a vessel at London bound for Boston, and having on board goods consigned to Perkins, drew a bill in favor of one of his (Abbot's) creditors upon Perkins, for the amount of freight to be paid by him. Abbot died, and his estate was insolvent, and after his death, which was known to Perkins, he accepted and paid the bill. Abbot's administrator then sued Perkins for the amount of freight; but the court held that "the draft was an assignment of the money that might become due for the freight," and that "Abbot's death was not a revocation of the request on the drawee to accept." Cutts v. Perkins, 12 Mass. R. 206. See also Debesse v. Napier, 1 M'Cord, 106.]

(18) Geary v. Physic, 5 Barn. & Cr. 234. In an action by plaintiff as endorsee of a note, it appeared that the endorsement was in pencil; and it was insisted that such an endorsement was not within the custom of merchants as to bills of exchange. Abbot C. J. thought it sufficient, but saved the point; and on R. N. for nonsuit and C. S. he observed that there was no authority that where the law requires a contract to be in writing that writing must be in ink; and in the absence of any authority to say with what material the writing should be, the Court thought they could not say that a writing in pencil was not sufficient. Rule discharged. [S. P. Closson v. Stearns, 4 Vermont R. 11.]

(19) Martin v. Chauntry, Str. 1271. on error from the Court of Common Pleas, the Court of King's Bench held that a written promise "to deliver up horses and a wharf, and pay money at a particular day," was not a note within the statute, and reversed the judgment which had considered it as such.

sum to C. or bearer, *and to take up A.'s note given to C. and D. for that amount*, is not a bill. *(h)*]

And they must be for the payment of money in specie: *(i)* an order or (20) promise to pay money "in good East India bonds;" or to pay "in cash or Bank of England notes" (21), [or paper medium *(k)*] is not a bill or note.

[*(h)* Cook v. Satterlee, 7 Cowen, 108.]

[*(i)* A note payable in chattels is not a promissory note under the statute. Jerome v. Whitney, 7 Johns. R. 321; Thomas v. Roosa, 7 Johns. R. 461; Pray v. Pickett, 1 Nott. & M'Cord, 254; Rhodes v. Lindley, 3 Ham. Ohio R. 51.

Booth drew an order on Manks in favor of Atkinson for 1642*l.* sterling, payable in the goods of Booth or the proceeds thereof, the Court held that this was not a bill of exchange, because it was not payable in money, and said, "besides it was in the alternative, and payable on a contingency, and out of a particular fund." Atkinson v. Manks, 1 Cowen, 691.

A note "which may be discharged in cotton," is not a negotiable instrument, and the endorser is not liable upon it. Lawrence v. Dogherty, 5 Yerger, 435. But such a note is held to be a money contract, if not discharged in cotton by the expiration of the time of payment. S. C. A note payable at a future day, with a memorandum that it may be discharged in salt at a certain rate per bushel, is after the day of payment specified in the note, a negotiable note payable in money only. The maker has not the right to pay in salt after that day. Stewart v. Donelly, 4 Yerger, 177.

In Vermont a note payable in chattels appears to be regarded in the same manner as one payable in money, in regard to presentment and notice in order to charge an endorser. Seely v. Bisbee, 2 Verm. R. 105. See Byington v. Gooding, 2 Ham. 227.]

(20.) Anon. Buller's Ni. Pr. 272. a written promise to pay 300*l.* to B. or order, "in three good East India Bonds," was held not to be a note within the statute.

[*(k)* Lange v. Kohne, 1 M'Cord, 115.]

(21) Ex parte Imeson, Hil. 1815, 2 Rose, 225. Case from Chancery, on the question, whether a country bank was debtor to the holder of certain of their notes, which he had taken from third persons, not from the bank; the notes were for payment some of five guineas, some of one guinea, "in cash or bank of England notes;" and after argument the Court held the bank not debtor to this holder, for these notes were not within the statute, because a delivery of bank notes, which might be of less value than cash, would satisfy them, and they were not absolutely and at all events for payment of money in specie.

S. P. ex parte Davison, Buck, 31.

Rex v. Wilcox, Easter, 1808. Indictment for forging and uttering a promissory note; the note was to "pay the bearer on demand one guinea in cash or bank of England notes." A case was reserved for the consideration of the twelve Judges, on the question, whether this was a note within the statute; a majority of them held it was not; and upon a representation to the crown, the prisoner was pardoned.

[Fales was sued as endorser of a note. The declaration was on a cash note. The note produced in evidence contained the words

[A writing signed by A. requesting B. to credit C. or bearer

[Foreign Bills] in brackets at the foot of it. A majority of the Court held that the evidence did not support the declaration, and that such a note was not negotiable, "because the import of the words, *foreign bills*, is not cash, but something different from cash." Parker J. thought that these words did not destroy the negotiable quality of the paper, because it was not the intention of the parties to affect its transferable quality by them. Jones v. Fales, 4 Mass. R. 245.

In a subsequent case in an action against the endorser of a promissory note payable in *foreign money*, the defendant's counsel objected that the note was not negotiable, and so that an action could not be maintained by an endorsee in this form. "But the Court held the declaration good." Sanger v. Stimson, 8 Mass. Rep. 260. The grounds of this decision do not appear in the report. Perhaps the Court did not consider the note as negotiable, but merely that this was the proper form of declaring by an endorsee against the endorser of a note not negotiable. Parsons C. J. in an earlier case said, that by the common law of the commonwealth "all notes for merchandise may be sued by the promisee against the promiser, and when endorsed by the endorsee against the endorser, who may declare in the same manner, as he might if the notes were negotiable." Jones v. Fales, 4 Mass. R. 245.

The Supreme Court of New York have taken a different view of this subject.—Count on a promissory note "payable in York State bills or specie." Demurrer. Per Curiam. "The count is good. The note therein stated is a negotiable note under the statute; and being declared to be payable in *York State bills or specie*, is the same thing as being made payable in lawful current money of the state; for the bills mentioned mean bank paper, which is here, in conformity with common usage and common understanding regarded as cash." Keith v. Jones, 9 Johns. R. 120.

So in a subsequent case, in an action against the endorser of a note payable "in bank notes current in the city of New York." Woodworth J. delivered the opinion of the Court. "The Court will take notice that notes current in the city of New York are of cash value throughout the State; and are distinguished by these words from other bank notes which are received at a discount. From authority I cannot perceive any objection to the note in question. It would have been a note under the statute if payable in bank notes generally; consequently it is valid, as such, when confined to a species of bank paper of known cash value." Judah v. Harris, 19 Johns. R. 144.

But a note payable "in Pennsylvania paper currency, or New York, to be current in the State of Pennsylvania or the State of New York," was held in New York not to be a note for the payment of money within the statute. Sutherland J. in giving the opinion of the Court, said, "The note is not payable in cash.—We may officially take notice that our own bank paper is, in conformity with common usage and common understanding, regarded as cash. But we cannot be supposed judicially to know the value of the paper currency of other States." Leiber v. Goodrich, 5 Cowen, 136.

In Pennsylvania it was held that a note payable to A. B. or order "in bank notes of the chartered banks of Pennsylvania," was not a negotiable note. Duncan J. in giving the opinion of the Court, controverted the case of Keith v. Jones; and observed that notes of the

with a certain sum, and he, A., would pay B., is not a bill or note. (*l*)]

And bills and notes must be for a specific amount. A bill or note for a given sum, "and for whatever else may be due to the payee," is not, even between the original parties, a bill or note. (22)

Nor is it good for the sum it specifies. (22)

But an order or promise to pay so many "pound," instead of "pounds," is a bill or note. (23)

[And an order to pay twenty-five, seventeen shillings, and thr e pence," may be declared on as a note for twenty-five *pounds*, &c. (*m*)

It is not necessary that the sum promised in a note should be expressed in words. It is sufficient if it be in figures. (*n*)]

New York banks had depreciated as well as those of Pennsylvania banks. "This note," he continued, "so far from being payable in money, is payable in forty kinds of paper of different value. To declare on this as on a note for the payment of 500 dollars, would have been a fatal variance." M'Cormick v. Trotter, 10 Serg. & Raw. 94.

The word *currency* in a note means *current money*, unless the instrument itself shows that the parties intended to attach a different meaning to the term. Dugan v. Campbell, 1 Hammond Ohio R. 115.

In Tennessee, a note payable in North Carolina bank notes was held to be a negotiable instrument on which the endorser was liable. Desberty v. Darnell, 5 Yerger, 451.]

(*l*) [Woolley v. Sergeant, 3 Halst. R. 262. A person who guaranties such an instrument is bound to see that the drawer pays according to the terms, and cannot set up want of demand or notice as a defence.]

(22) Smith v. Nightingale, 2 Stark. 375. Defendant gave Eastling this note: "I promise to pay James Eastling, my head carter, 65*l*. with lawful interest for the same, three months after date, *with all other sums that may be due to him.*" Eastling's administratrix sued thereon. Lord Ellenborough thought it no note, even for the 65*l*., but an agreement, and it not having an agreement stamp, he nonsuited the plaintiff.

[See also Bolton v. Dugdale, 4 Barn. & Adol. 619.]

(23) Rex v. Post, Pasch. 1806. Prisoner altered a note for one pound into a note for ten, by substituting ten for one before the word "Pound" in the body of the note, and also in the corner. It was urged that a note for payment of ten *pound* was not a money note: On a case reserved, the Judges were clear that it was, and that a capital conviction of the prisoner for forgery was right.

[(*m*) Phipps v. Tanner, 5 C. & P. 488.]

[(*n*) Nugent v. Roland, 12 Martin, 659. In Louisiana, by statute, no note, bill, draft or check was "obligatory or admissible in evidence, unless the sum was expressed in words at full length." See Pilie v. Mollere, 14 Martin, 666.

Sect. 5.—Negotiable bills or notes made in England for less than (24) twenty shillings are void; and all negotiable bills or notes made in England (except drafts or orders by a man upon his banker, or person acting as banker,) for twenty shillings and less than (25) five pounds, unless made conformably with certain regulations, are also void; and the person issuing or negotiating them, in case they are under twenty shillings, is (26) liable to a penalty not exceeding 20*l.*, nor less than 5*l.*; and in case they are between 20 shillings and 5*l.*, to a penalty of 20*l.*

These regulations are, that they specify the name and place of abode of the person to whom or to whose order they are made payable; that they be attested by one subscribing witness; that they bear date at or before the time when they are issued; and be made payable within twenty-one days after the date.

These provisions were, by 7 Geo. IV. c. 6. s. 2., suspended as to notes of bankers and others duly licensed, and stamped before the 5th of February, 1826, and as to Bank notes stamped before the 10th of October, 1826, so as they were not issued or re-issued after the 5th of April, 1829; but from the 5th of April, 1829, the issuing or re-issuing them subjects the party to a penalty of 20*l.* for each note. (27)

But the statute did not apply to notes, &c. made before the passage of the act. White v. Brown, 15 Martin, 17.

This law has been repealed. But notes made while the statute was in force were still invalid after the repeal. Where a note expressed the dollars in words and the cents in figures, it was held valid for the dollars, but void for the cents; and it was also held that where a petition set forth a note stating the cents, it was not supported by a note with the dollars in words and the cents in figures, as the Court could take no notice of the figures. White v. Noland, 15 Martin, 636.

But where, in a similar case, the petition set out only the dollars, judgment was given for the plaintiff. Pilie v. Mollere, 16 Martin, 42.]

(24) By 48 Geo. III. c. 88. s. 2.

(25) By 17 Geo. III. c. 30. s. 1. made perpetual by 27 Geo. III. c. 16.

(26) By 48 Geo. III. c. 88. s. 3. where the bill or note is for less than twenty shillings; and by 17 Geo. III. c. 30. s. 2. where it is for less than five pounds.

(27) 7 Geo. IV. c. 6. s. 3. imposes the penalty of 20*l.* per note for issuing or re-issuing after 5th April, 1829, certain notes therein specified payable to bearer on demand, for sums between 20*s.* and 5*l.*, and s. 4. provides for all other bills or notes for similar sums.

And the uttering or negotiating in England of any negotiable note, draft, or undertaking in writing for payment to the bearer on demand of any sum less than 5*l.*, or on which less than 5*l.* shall remain undischarged, though the same were made or issued, or purport to have been made or issued in Scotland or Ireland, will subject the party to a penalty not exceeding 20*l.* nor less than 5*l.*, to be recovered in a summary way before one or more justices, and with a power of remitting or mitigating in the Treasury. (28)

Sect. 6.—A bill or note must purport that the money mentioned in it shall be payable absolutely and at all events; if it purport to make the payment depend on any uncertainty or contingency, the instrument is not, except in certain cases as to the stamp duties, a bill or note; and if it be not a bill or note ab initio, no subsequent (29) event can make it so.

Thus an order or promise to pay money "provided (30) the terms mentioned in certain letters shall be complied

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(28) 9 Geo. IV. c. 65.

(29) See Colehan v. Cooke, Willes, 393. and Hill v. Halford, post, and Blankenhagen v. Blundell, post.

[Coolidge sued Ruggles on a note originally given to Skinner, expressed to be payable to bearer, "provided the ship Mary arrived at an European port of discharge free from capture and condemnation by the British." Parker C. J. delivered the opinion of the Court. "We are all of opinion that the written promise declared on is not negotiable in its nature, so that an action may be maintained on it by the name of the assignee, on account of the contingency, on which the payment is made to depend." Coolidge v. Ruggles, 15 Mass. R. 387.

A promise to pay a corporation a certain sum upon every share of stock subscribed for by the promiser, "in such manner and proportion, and at such time and place, as shall be determined by the President, Directors, and Co." is not a promissory note within the statute, on account of the contingency. Union Turnp. Co. v. Jenkins, 1 Cain. R. 381.

See Atkinson v. Manks, ante p. 10.]

(30) Kingston v. Long, B. R. M. 25 Geo. III. The plaintiff brought an action as endorsee against the defendant, as acceptor, upon an order importing to be payable, *provided the terms mentioned in certain letters written by the drawer were complied with*, and the Court held clearly that the plaintiff could not recover, though the acceptance admitted a compliance with the terms; for, the order was no bill until after such compliance, and if it were not a bill when drawn, it could not afterwards become one.

with;" "provided (31) I. S. shall not be surrendered to prison within a limited time;" "provided (32) I. S. shall not pay the money by a particular day;" "provided (33) I. S. shall leave me sufficient, or I shall otherwise be able to pay it;" or "when I. S. (34) shall marry;" is, on account of the contingency to which the payment is subjected, neither a bill nor a note.

So, an order or promise to pay "out of my (35) growing

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(31) Smith v. Boheme, 3 Lord Raym. 67. cit. Lord Raym. 1362. 1396. Action by payee against the makers upon a note promising to pay plaintiff or order on demand 71*l.* 12*s.* 10*d.* "or to surrender the body of Samuel Boheme in an action brought against him by plaintiff." Verdict for the plaintiff and judgment; and on error brought in the King's Bench, the Court held that this was not a note within the statute, because the money was not absolutely payable, but depended upon the contingency whether the defendants should surrender Samuel Boheme to prison; and the judgment was reversed, 9th of June, 1724.

(32) Appleby v. Biddulph, cit. 8 Mod. 363. 4 Vin. 240. pl. 16. An action was brought on this note, "I promise to pay to T. M. 50*l.* if my brother doth not pay it within six weeks;" and after verdict for the plaintiff, the court arrested the judgment, because the maker was only to pay it on a contingency.

Ferris v. Bond, B. R. Trin. 2 Geo. IV. A note was in these words: "I John Connor promise to pay John Ferris or his order 50*l.* with interest, at six months notice, dated 24th of June, 1808. (Signed) J. Connor.——Or else Henry Bond." In an action upon this against Bond, the question was reserved whether this was, as to Bond, a note within the statute; and the court after argument held it was not, because Bond's engagement was only to pay if Connor did not; and a rule for a nonsuit was made absolute.

(33) Roberts v. Peake, Burr. 323. The plaintiff as endorsee of a note sued one of the makers; the instrument was in these words: "We promise to pay A. B. 116*l.* 11*s.*, value received, on the death of George Henshaw, provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it;" and upon a case reserved, the Court held it was not a negotiable note, because it was payable eventually and conditionally only, and not absolutely and at all events, and a nonsuit was entered. See Williamson v. Bennett, post.

(34) Beardsley v. Baldwin, Str. 1151. A note to pay money within so many days after the defendant should marry, was (on consideration) held not to be a negotiable note; and in Pearson v. Garrett, Comb. 227. and 4 Mod. 242. (which, however, was before the statute,) an action having been brought upon a note by which the defendant promised to pay the plaintiff sixty guineas if he, the plaintiff, should be married within two months, the court inclined against the note, because it was to pay money on a mere contingency, and judgment was given on demurrer for the defendant.

(35) Jocelin v. Laserre, Fort. 281. 10 Mod. 294. 316. Evans drew upon Jocelin, and required him to pay Laserre 7*l.* a month "out of

subsistence," or "out of the (36) fifth payment when due," or "out of (37) money when received," is, on account of the uncertainty whether the subsistence or payment will become due, or the money be received, neither a bill nor a note.

So, an order to pay a sum "out of (38) rents," or (39) "out of other money in the hands of the person to whom it is addressed," is no bill; because, he may not have rent or other money in his hands sufficient to discharge it.

So, a promise to pay (40) "on the sale or produce, imme-

Evans's growing subsistence," and Jocelin accepted the draft. Laserre sued Jocelin, and had judgment, but upon a writ of error that judgment was reversed, because this draft was not a good bill of exchange, inasmuch as it would not have been payable had Evans died, or had his subsistence been taken away.

(36) Haydock v. Linch, Lord Raym. 1563. Rogers drew upon Linch and requested him to pay Haydock 14*l.* 3*s.* "out of the fifth payment when it should become due, and it should be allowed by Rogers." Linch accepted the draft, and Haydock sued him, but the Court, on demurrer to the declaration, held this was no bill of exchange, and gave judgment for the defendant.

(37) Dawkes v. Lord Deloraine, Blackst. 782. 3 Wils. 207. A draft was in these words: "8th of January, 1768, Seven weeks after date, pay Mrs. Dawkes 32*l.* 17*s.* out of W. Steward's money as soon as you shall receive it, for your humble servant, Deloraine. To Timothy Brecknock, Esq." Brecknock accepted the bill, but it not being paid, Mrs. Dawkes brought an action upon it against Lord Deloraine, who pleaded that Brecknock had not received W. Steward's money, and upon demurrer to his plea, insisted that this was not a bill of exchange. The Court, after argument, held the objection good; because it was payable out of a particular fund, and on an event which was future and contingent, viz. the receipt of W. Steward's money, whereas a bill ought to be subject to no event or contingency, except the failure of the general personal credit of the persons drawing or negotiating it. In Wilson, 262, is a report from hearsay, of a determination that a promise to pay a sum of money, "on the receipt of the payee's wages due from a ship in government service," was a good note, but that may perhaps be questioned, because the maker might never receive the wages.

(38) Lord Raym. 1362. Str. 592. Fort. 282.

(39) Jenny v. Herle, Lord Raym. 1361. 8 Mod. 265. Str. 591. Herle sued Jenny upon a bill drawn by him upon Pratt, and payable to Herle to this effect: "Sir, you are to pay Mr. Herle 1945*l.* out of the money in your hands belonging to the proprietors of the Devonshire mines, being part of the consideration-money for the purchase of the manor of West Buckland." Herle had judgment in the Common Pleas, but upon a writ of error, the Court of King's Bench held this was no bill of exchange, because it was only payable out of a particular fund supposed to be in Pratt's hands, and the judgment was accordingly reversed. [See Atkinson v. Monks, ante, 10.]

(40) Hill v. Halford and another in Error, 2 B. and P. 413. The

diately when sold, of the White Hart Inn, St. Alban's, and the goods," &c. is no note: nor would it make any difference though the White Hart and goods were sold before the action was commenced.

[So, an order payable when certain carriages are sold by the payee, is not a bill. (*o*)]

So, an instrument in the form of a note, but with a memorandum written upon it, stating that it is taken "for (41) securing the payment of all such balances as shall be due from one of the makers to the payee, to the extent of the sum mentioned therein;" or "that if any dispute shall arise respecting the subject which is the consideration for it, it shall be void," is no note. (42)

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defendants in Error sued Hill as maker of a note, thereby promising to pay them 190*l*., "on the sale or produce, immediately when sold, of the White Hart, St. Alban's, Herts, and the goods, &c. value received." The declaration averred a sale of the inn and goods before the commencement of the action. After judgment in K. B. by default, writ of inquiry executed, and general damages recovered, Hill brought a writ of error in the Exchequer Chamber, and the court held that this promise could not be declared on as a note, and therefore reversed the judgment.

[The endorsee sued the maker of the following note. "Trenton, Oct. 29, 1806. This may certify that I do agree to pay unto Solomon Stevens or order forty dollars by the 20th of May, or when he completes the building according to contract." In the Common Pleas the court thought the note payable on a contingency, and so not negotiable, and directed a verdict for the defendant. On Error the Supreme Court "held the note payable absolutely at a day certain," and ordered a new trial. Stevens v. Blunt, 7 Mass. R. 240. The reasons of this decision are not stated by the Reporter.]

[(*o*) De Forrest v. Frary, 6 Cowen, 151.]

(41) Leeds & al. v. Lancashire, 2 Camp. N. P. C. 205. The defendant, Marriott, and Ball gave a joint and several promissory note to the plaintiffs for 200*l*. No time for payment was mentioned in the note. On the back was written, "The within note is taken for security of all such balances as Jas. Marriott may happen to owe to Thos. Leeds and Co. not extending farther than the within-named sum of 200*l*.; but this note to be in force for six months, and no money liable to be called for sooner in any case." This memorandum was written before the note was signed by the defendant or Ball. It appeared in an action upon this note, that in the course of mercantile dealings, Marriott had become indebted to the plaintiffs, and that on their refusing to deal with him any longer without some guaranty, the above instrument, which the makers represented to be a note, was given. It had a note stamp. Lord Ellenborough held that as between the original parties it was an agreement, and not a note, and therefore nonsuited the plaintiffs.

(42) Hartley v. Wilkinson, 4 Camp. 127. 4 M. & S. 25. A note was

[So, an instrument signed by the daughter of A. and her husband, in the following form: "On demand, we promise to pay to A. or his order, 1200*l.* for value received in stock, &c., this being intended to stand against me, M. (the daughter) as a set-off for that sum left me in my father's will above my sister Anne's share," is not a note, because it is not payable at all events. (*p*)]

So, an instrument acknowledging the receipt of drafts for the payment of money, and promising to pay the money specified in the drafts, is (43) not a promissory note; for, the payment of the money is contingent, it depends upon the drafts being honored.

So, an order from the (44) owner of a ship to the freighter

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made payable to Foster or order, for 25*l.* "being the amount of the purchase-money for a quantity of fir belonging to Mr. Hartley." Before the note was signed, this memorandum was endorsed upon it:—"This note is given on condition that if any dispute shall arise between Mr. Hartley and Lady Wray respecting the fir, this note to be void." In an action upon this note by endorsee against the maker, Lord Ellenborough thought it not a note within the statute, because its payment depended upon there being no dispute between Mr. Hartley and Lady Wray, and he nonsuited the plaintiff. On a motion for a new trial, the Court agreed with him, and refused a rule.

[(*p*) Clarke v. Percival, 2 Barn. & Adol. 660.]

(43) Williamson & al. v. Bennett & al., 2 Camp. N. P. C. 417. The defendants were sued upon the following instrument, which was stamped and declared upon as a promissory note: "Borrowed and received of J. and J. Williamson (the plaintiffs) the sum of 200*l.* in three draughts, by W. and B. Williamson, dated as under, payable to us W. Bennett and S. M. (the defendants) on J. and J. Williamson, which we promise to pay unto the said J. and J. Williamson, with interest. As witness our hands this 26th day of August, 1802.

"August 26,	1 draught at 2 months	£120
" ———	1 do. ———	30
" ———	1 do. ———	50
		£200

(Signed by the defendants.)

Lord Ellenborough held that this was not a promissory note. He said there could be no doubt that the money was not payable immediately, and that it was not to be paid at all, unless the drafts were honored. The plaintiffs were nonsuited.

(44) Banbury v. Lisset, Str. 1211. Gibson drew on the defendants in favor of the plaintiff "on account of freight of the galley Veale, Edward Champion, and this order shall be your sufficient discharge for the same." The action was brought against the defendants as ac-

to pay money "on account of freight" is no bill; because, the quantum due for freight may be open to litigation: but, such an order from the freighter (45) is; because, it is an admission that so much at least is due.

And an order to pay money "as (46) the drawer's quarter's half-pay by advance" before the pay will be due, is a good bill; because, it will be payable though the half-pay shall never become due.

So, a note to pay a sum of money (47) "being a portion of a value as under deposited in security for the payment hereof according to the receipt in my hands," or "for value deposited

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ceptors, and they contended it was not a bill of exchange, because it was only payable out of a particular fund; and Lee, C. J. was of that opinion, but he left the point to the jury, who found for the defendants on another ground.

(45) Pierson v. Dunlop, Cowp. 571. M'Lintot freighted a ship of which Nichol was captain, and Pierson owner, and being unable to pay the freight, drew upon Dunlop and Co. in favor of Nichol "on account of freight." Pierson afterwards sued Dunlop and Co. as acceptors, and though other objections were taken, it was never insisted that this was contingent or payable only out of a particular fund.

(46) Macleod v. Snee, Lord Raym. 1481. Str. 762. 1 Barnard. 12. Macleod was sued in the Common Pleas as acceptor of a bill of exchange drawn by Dundas and endorsed to the plaintiff, dated 25th of May, 1724, by which Dundas required him one month after date "to pay 9*l*. 10*s*. as his (Dundas's) quarter's half-pay from the 24th June, 1724, to 25th September following, by advance," and obtained judgment. Macleod brought a writ of error, and insisted that this was similar to the cases of Jocelin v. Laserre, and Jenny v. Herle; but the whole Court was of a contrary opinion; for per cur. "this bill was not payable upon a contingency, nor out of a particular fund, but is made payable at all events, and drawn upon the general credit of the drawer, and not out of the half-pay, for it is payable as soon as the quarter begins, and the half-pay was not to be due till three months afterwards."

(47) Haussoullier v. Hartsink, 7 Term Rep. 733. The defendant issued two notes upon a deposit by one Richardson: one payable to J. S. or bearer, for 25*l*. "being a portion of a value as under, deposited in security for payment hereof according to the receipt in our hands," and specifying the particulars of the deposit; the other, payable to J. S. or order, "for value deposited and registered ⅄." The plaintiff discounted both notes, bonâ fide, and for a valuable consideration: and on a case reserved the Court said they were clearly of opinion, that though as between the original parties to the transaction, the payment of the notes was to be carried to a particular account, yet the notes were payable at all events, and therefore the plaintiff was entitled to recover.

and registered," is a good note; because it imports to be payable at all events.

So, an order or promise to pay money "when (48) J. S. shall come of age," specifying the day when that event is to happen, is a good bill or note; because, it is payable though J. S. die in the interim.

And an order or promise (49) to pay "within a limited time after a man's death" is a good bill or note; because it must become payable at some time or other, though the exact period is uncertain: and if a bill or note be made payable at ever so distant a day, if it be a day that must come, it is no objection to the bill or note. (50)

So, an order or (51) promise to pay "within a limited time after the payment of money due from government" is a good bill or note; because it is morally certain that such payment will be made.

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(48) Goss v. Nelson, Burr. 226. Action on a note payable to an infant "when he (the infant) shall come of age, to wit, 12th June, 1750;" and it was objected in arrest of judgment, that it was uncertain whether the money would ever have been payable, because the infant might have died under 21; but the Court held it a good note, because it was payable at all events on the 12th June, 1750, though the infant should have died before that time.

(49) Cooke v. Colehan, Str. 1217. Willes, 393. On error from the Common Pleas, the Court held a note payable "six weeks after the death of the defendant's father," a good negotiable note, because there was no contingency whereby it might never become payable, but it was only uncertain as to the time, which is the case with all bills payable so many days after sight.

(50) Per Willes, Ch. J. in delivering judgment in Colehan v. Cooke, Willes's Rep. 394.

(51) Andrews v. Franklin, Str. 24. A note payable two months "after a certain ship (in his majesty's service) should be paid off," was objected to, as depending upon a contingency which might never happen: but per cur. "the paying off the ship is a thing of a public nature; it is morally certain:" judgment for the plaintiff. In Evans v. Underwood, 1 Wils. 262. where an action was brought by an endorsee against the maker upon a note payable on the receipt of the payee's wages from his majesty's ship the Suffolk, the Court thought the case like that of Andrews v. Franklin, and after looking into that case *are said* to have given judgment for the plaintiff. Quære tamen, because it was uncertain, though the wages might be paid, whether the maker would receive them.

Sect. 7.—It is not in general essential that a bill or note should be dated.

But negotiable bills or notes, except bank notes, for between 20*s*. and 5*l*., if made in England, must. (52)

And notes payable to the bearer on demand must not have the dates printed. (53)

And giving false dates to evade the stamp duties upon drafts on bankers, or upon bills or notes not payable within two months after date or sixty days after sight, will subject the party to a penalty of 100*l*. (54)

And leaving a blank for the date may create difficulties, unless the stamp be sufficient for a bill or note of the most extended date.

If a bill or note is dated forward, of a day not arrived, and any of the parties die before that day, such deaths will be no bar to the remedy of a bonâ fide holder. (55)

So, if a blank be left for the date, and that date is afterwards filled up, the manner of filling it up will furnish no ground of objection either to the original parties;

Or to the person who filled it up; (56)

Unless under the stamp laws.

Sect. 8.—Bills and notes are either inland or foreign: inland, when made and payable within this kingdom; and foreign, when made or payable abroad.

[A bill drawn in one of the United States, and payable in another of the States, is a foreign bill. (*q*)

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(52) See ante, p. 13.
(53) See 55 G. 3. c. 184. s. 18.
(54) See 55 G. 3. c. 184. s. 12, 13.
(55) See Passmore v. North, post.
(56) See Usher v. Dauncey, post.

[(*q*) This position, though formerly doubted, is now well settled. In South Carolina it was held that a bill drawn in New York upon Charleston, (S. C.) was a foreign bill, and therefore that a protest for non-acceptance was necessary in order to charge an endorser. *Nott J.* delivered the opinion of the Court. "Sovereignty or jurisdiction over the subject appears to be the criterion by which to determine the character of the instrument. It would seem correct, therefore, to consider bills between the several States as foreign. They are usually sent in sets. Exchange is allowed on them; and unless a protest is to be re-

So, a bill drawn in Ireland, payable in England, is not an inland, but a foreign bill. (*r*)]

It was once doubted whether notes would be entitled to the aid of 3 & 4 Ann. c. 9., unless they were made in England (57): but, there have been instances (58) (59) (60)

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ceived as evidence of non-acceptance, the difficulty of proving the fact would very much obstruct that kind of intercourse between the States. However they may have been considered in other States, there has never been but one opinion on the subject in this State." Duncan v. Course, 1 S. Car. R. 100.

In the case of Lonsdale v. Brown, in an action against the drawer of a bill drawn in New Orleans upon Philadelphia, a protest of the bill being offered in evidence, was objected to by the defendant's counsel on the ground that it was an inland bill. Washington J. however admitted the evidence, and on a motion for a new trial held that the protest was properly admitted, because the bill was a foreign bill. Lonsdale v. Brown, 4 Wash. C. C. R. 86, and S. C. 4 Wash. C. C. R. 148.

The United States statute, 1789, c. 20, s. 11, enacts that no District or Circuit Court shall "have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee; unless a suit might have been prosecuted in such Court to recover the said contents, if no assignment had been made; except in cases of *foreign bills* of exchange." *Held*, that a bill of exchange drawn in one State and payable in another, was a *foreign bill*, and therefore that the Circuit Court of the United States had jurisdiction of an action brought on such a bill by an endorsee against the drawer of such a bill, although the drawer and payee were inhabitants of the same State. Buckner v. Finley, 2 Pet. Sup. C. R. 586.

In Phœnix Bank v. Hussey, 12 Pick. 483, it was held, that a bill drawn by a person residing in one of the United States on a person residing in another, was a foreign bill, and therefore that a protest was necessary in order to charge the drawer.

In New York a bill drawn in one of the United States upon a person within the United States, though not in the same State with the drawer, has been considered as an inland bill; and therefore requiring no protest, since the statute of 9 and 10 W. III. requiring a protest on such bills is not adopted in that State. The case, however, turned upon another point. Miller v. Hackley, 5 Johns. R. 375.]

[(*r*) Mahoney v. Ashlin, 2 Barn. & Adol. 478.]

(57) Carr v. Shaw, B. R. Hil. 39 Geo. 3. In an action on a promissory note made at Philadelphia, the first count of the declaration stated that the defendant, at Philadelphia, in parts beyond the seas, to wit, at London, &c. according to the form of the statute, &c. made his note in writing, &c. There were also the common money counts. The defendant demurred specially to the first count, and pleaded the general issue to the others. On the demurrer the court intimated a strong opinion that the statute did not apply to foreign notes, and advised the plaintiff to amend: but on the general issue Lord Kenyon said, "the note, though not within the statute, is evidence to support any of the money counts," and the plaintiff had a verdict at Guildhall, 1st May, 1799.

since in which actions have been brought upon such notes without exception; 48 G. 3. c. 149. s. 21. prohibited the negotiation or payment of such notes unless they were stamped; this prohibition is still continued by 55 G. 3. c. 184. s. 29. as to notes payable to the bearer on demand: and it has lately been decided, in the case (59) of a note made in Scotland, that the statute 3 & 4 Ann. applies to foreign as well as inland notes; and such notes are negotiable, and transferable by endorsement. in England. (59)

And it is no objection to a bill or note that it was made by a British subject in an enemy's country in time of war, if it do not appear to have been made for any illegal purpose, and it were made payable to a neutral. (60)

N. The pleadings are entered as of Michaelmas Term, 39 G. 3. Roll. 1238.

(58) See Pollard v. Herries, 3 Bos. & Pull. 335, where the plaintiffs recovered upon notes made at Paris. See also Splitgerber v. Kohn, post.

(59) Milne v. Graham, 1 Barn. and Cr. 192. In an action by endorsee of a note against the maker, it appeared in evidence upon the trial that the note was made in Scotland, and it was objected that the act applied to notes made in England only: Abbott C. J. thought otherwise, and on motion for a new trial the Court thought the case within the words and spirit of the act. The words are, "all notes." The act was made to advance trade, and was therefore entitled to a liberal construction; and it is for the advantage of commerce that foreign as well as inland notes should be negotiable. Rule refused.

Bentley v. Northouse, 1 Moody & Malkin, 66. In an action by the endorsee of a note made in Scotland against the maker, it was insisted that Scotch notes were not negotiable, or transferable by endorsement, the power of so transferring them being created by 3 & 4 Anne, and that Act, as being before the union, not extending to Scotland: but Lord Tenterden said, there was nothing in the act to confine its operation in England to notes made there: the words "as inland bills" in the act apply only to the manner of transferring and enforcing the notes, not to the sort of notes: within the jurisdiction, therefore, of the act, that is, in England, *all notes*, wheresoever made, are transferable by endorsement. Verdict for plaintiff.

(60) Houriet v. Morris, 3 Campb. 303. Payees against maker on note made at Paris in time of war: defendant was a British subject, plaintiffs neutral merchants in Switzerland: the note was given by defendant for watches bought by him in Paris of plaintiffs: it was objected that this was a trading in an enemy's country in time of war, and that a note founded on such trading was not valid: but Lord Ellenborough said, plaintiffs were not enemies, and might legally sell their goods in an enemy's country, and defendant did not appear to have bought them for any illegal purpose. Plaintiffs had a verdict.

Or, if made by a British prisoner of war, though made payable or endorsed to an alien enemy. (61)

Inland bills and notes seldom consist of more than one part: foreign bills in general consist of several.

The several parts of a bill are called a set.

Each part ought to contain a condition that it shall be payable only so long as all the others remain unpaid: in other respects all are of the same tenor.

This condition should be inserted in each part, and should in each mention every other part of the set; for if a man, with an intention to make a set of three parts, should omit the condition in the first, and make the second with a condition mentioning the first only, and in the third alone take notice of the other two (which, by the way, is the mode pointed out by (62) Molloy, (63) Malynes, and (64) Marius), he might perhaps in some cases be obliged to pay each; for, it might be questionable if it would be any defence to an action on the second that he had paid the third, or to an action on the first that he had paid either of the others.

But an omission is not, perhaps, material, which upon the face of the condition must necessarily have arisen from a mistake; as, if in the enumeration of the several parts one of the intermediate ones were to be omitted, for instance, "Pay this my first of exchange, second and *fourth* not paid."

Where a bill consists of several parts, each ought to be delivered to the person in whose favor it is made, (unless one is forwarded to the drawee for acceptance,) otherwise there may be difficulties in negotiating the bill, or obtaining payment.

Sect. 9.—A bill or note may fix a particular place for payment.

And where this is what is to be considered as part of the bill or note, it is, except in cases in which 1 & 2 Geo. 4. c. 78.

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(61) See Antoine v. Morshead, and Daubuz v. Morshead, post.
(62) Book 2. c. 10. s. 14.
(63) Book 3. c. 5. p. 261, 262.
(64) P. 7.

has made a difference (65), a variance to omit stating it (66); and where it is not to be considered as part of the bill or note, it may be a variance to state it. (67)

And in an action against the maker of the note, or acceptor of the bill, it may be necessary, where it is part of the bill or note, to allege and prove presentment at that place. (68)

In cases to which 1 & 2 Geo. 4. does not apply, the place is considered part of the instrument where it is incorporated in the body of the bill or note; where it is detached from the body as a memorandum only, not: and in cases within 1 & 2 Geo. 4. the place will be considered as part of the instrument, if it be made payable there "and not otherwise or elsewhere."

Notes payable to bearer on demand, if for less than 20*l.* must be made payable at the bank or place where they are made or issued. (69)

But they may be made payable at several places, so as such bank or place be one. (69)

And bills or notes by banking corporations, or banking copartnerships of more than six members, if payable to the bearer on demand, or, in the case of bills, if for less than 50*l.* must be made payable at some place or places to be specified therein, not within the distance of sixty-five miles from London. (70)

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(65) See Selby v. Eden, 3 Bingh. 611. And Fayle v. Bird, 6 Barn. and Cr. 631. post.

(66) Hodge v. Fillis. See post.

(67) Exon v. Russel, post.

(68) Roche v. Campbell. See post.

[But the Supreme Court of Massachusetts, in an action by the endorsee against the maker of a note payable at the Penobscot Bank, held that a plea that the holder of the note was not present at the time and place appointed for payment was bad; and said, "This is no bar to an action on a promise to pay money: and the issue tendered was therefore an immaterial one." Ruggles v. Patten, 8 Mass. R. 480.]

(69) By 7 Geo. 4. c. 6. s. 10. every promissory note, payable to bearer on demand, for a sum of money under 20*l.*, made and issued after 5th April, 1829, shall be made payable at the bank or place where the same shall be so made and issued: Provided, that it shall not prevent its being made payable at several places, if one of such places be the bank or place where the same shall be issued.

(70) 7 Geo. 4. c. 46.

[Sect. 9.*—A note payable "on demand with interest after six months," is payable on demand. (*s*)

But a note payable "on demand with interest after four months," with the words "*on demand*" erased, but still legible, is payable in four months. (*t*)

There is no difference between a note payable "*when demanded*," and one payable "*on demand*." Therefore the statute of limitations begins to run in favor of the maker of a note payable "*when demanded*," from the day of the date, and not from the time of presentment. (*u*)]

Sect 10.—Bills and notes are made payable to order, or to bearer, or to specified individuals.

A bill or note payable to J. S. or order, is payable to the order of J. S. and negotiable by endorsement. A bill or note payable to J. S. or bearer, is (71) payable to the bearer and negotiable by delivery; and in the latter case J. S. is a mere cipher.

[But a note saying "Due the bearer hereof" a certain sum, "which I promise to pay to A. B. or order," is not a note payable to bearer, but to A. B. or order. (*v*)]

If a bill or note import to be payable to a person not in esse or his order, and be issued with an endorsement in blank,

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[(*s*) Loring v. Gurney, 5 Pick. 15.
(*t*) Hobart v Dodge, 1 Fairf. 156.
(*u*) Kingsbury v. Butler, 4 Verm. R. 458.]

(71) Grant v. Vaughan, Burr. 1516. Vaughan gave Bicknell a draft upon his banker payable "to ship Fortune or bearer." The draft came to the hands of Grant, who sued Vaughan upon it. The defendant contended that this draft was a mere authority to receive the money, and not negotiable, and that point and another being left to the jury, they found for the defendant; but upon an application for a new trial and cause shown, the Court held clearly that it was negotiable, and a new trial was granted, in which the plaintiff recovered.

[See also Ellis v. Wheeler, 5 Pick. 18.]

[(*v*) The bearer sued the maker of the following note: "Due the bearer hereof 3*l*. 18*s*. 10*d*., which I promise to pay to Abraham Thompson or order." Thompson had not endorsed the note. Per Curiam. "The word, *bearer*, has reference to Thompson, and as the promise is expressly to pay to him or order, another person could not maintain an action on the note without his endorsement." Cook v. Fellows, 1 Johns. R. 143.]

purporting to be made by him thereon, it is, as against the drawer or maker, to be considered as a bill or note (72) pay-

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(72) This point has been repeatedly discussed within a few years upon several bills drawn in 1788. A case of the kind had occurred at the London Sittings after Easter Term 1769; Stone v. Freeland, cited 1 H. Bl. 316. in the notes: a bill drawn by Cox on the defendant was made payable to Butler and Co. or their order, and endorsed in their name; and instead of proving that this endorsement was made by Butler and Co., the plaintiff's own witnesses said, they believed it was made by Cox, and though there was a house under the firm of Butler and Co. with which Cox had dealings, it was proved that the bill had never been in their hands, upon which it was contended that the endorsement being fictitious, the plaintiff could not recover; but by Lord Mansfield, "the intent of the bill was only to enable Cox to raise money, and the reason why it was not made payable to his order was, that there would then have been too many payable to his order in circulation at the same time, which would have had the appearance of fictitious credit; names are often used of persons who never existed;" and it appearing that the defendant promised to pay the bill at the time the plaintiff discounted it, the jury, upon the footing of that undertaking, found a verdict for the plaintiff. As this case, however, was distinguishable from those on the bills drawn in 1788, on account of the express undertaking to pay the plaintiff, which (as was admitted by Mr. J. Ashhurst, who held a brief in the cause, in 3 Term Rep. 176.) was the ground of the determination, as this was a nisi prius decision only, and as the amount of the bills in 1788 was very considerable, the point was very strongly contested in the actions on those bills. The first case that came before the Court was Tatlock v. Harris, 3 Term Rep. 174. It was an action brought upon a bill drawn by the defendant, as one of several partners in a house at Nottingham upon himself in London, payable to Grigson and Co. or order, and purporting to be endorsed by Grigson and Co. and Lewis and Potter; the defendant was sued upon the bill, and the declaration contained counts upon the bill, and counts for money paid and money had and received. It appeared in evidence that there was no such house as that of Grigson and Co.; that the defendant paid the bill to Lewis and Potter, to whom he was indebted, and they gave him credit in account; and that the plaintiffs discounted it for Lewis and Potter: to this evidence the defendant demurred: and after argument and time taken to consider, the Court intimated a strong opinion that the plaintiffs might recover on the counts upon the bill; but the ground of their decision was, that he was entitled to recover on the counts for money paid, and money had and received: because, the giving the bill was an appropriation of so much money to be paid to the person who should become holder of the bill, and therefore when the plaintiffs discounted it, they paid the money to the use of the defendant, and when Lewis and Potter gave the defendant credit for the value of the bill, that was money had and received to the use of such persons as should afterwards be the holders of the bill.

The next case was that of Vere v. Lewis, 3 Term. Rep. 182, which was an action against the defendant as acceptor, and the only difference between that and Tatlock v. Harris was, that there was no evi-

able to bearer; and so is a bill as against the acceptor, if he knew at the time of his acceptance, that the payee was a fictitious person.

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dence to show that the defendant had received any value for the bill, and that there was strong evidence to show that the endorsement, in the name of the payee, was made by the defendant; but the Court held that the latter circumstance did not vary the question, and that the acceptance was evidence that the defendant had received value from the drawers, and therefore they gave judgment for the plaintiffs without argument. Lord Kenyon, Mr. J. Ashhurst, and Mr. J. Buller, thought also that he was entitled to recover on one of the counts of the declaration, which stated the bill to be payable to bearer.

This case was followed by that of Minet v. Gibson, 3 Term Rep. 481. 1 H. Bl. 569. where a bill, drawn by Livesay and Co. on the defendants, was made payable to John White, or order; and it was found upon a special verdict, that White was a fictitious person; that his name was endorsed upon the bill by Livesay and Co.; that the defendants knew, when they accepted the bill, that no such person as John White, whose endorsement was then upon the bill, existed; and that the endorsement was not made by any person of that name: the Court of King's Bench thought this case decided by Vere and Lewis, and gave judgment for the plaintiffs; and on a question from the House of Lords, whether the bill might not be deemed in law to be payable to the bearer, Hotham, Perryn, and Thompson Barons, and Gould J. gave it as their opinions that it might; but Eyre C. B. and Heath J. differed: after which Lord Kenyon, Lord Loughborough, and Lord Bathurst spoke in favor of the judgment, and Lord Thurlow against it, and the judgment was affirmed without a division.

After the judgment in Minet v. Gibson, in the King's Bench, and before its determination in the House of Lords, came on the case of Collet v. Emmett, 1 H. Bl. 313. where Livesay and Co. (who were authorized by the defendant to draw for him by his writing his name on a piece of blank paper with a shilling stamp thereon), made a bill payable to George Chapman, or order, and endorsed it with George Chapman's name; and it appearing that there was no such person as George Chapman, the court of Common Pleas, after two arguments, and time taken to consider, held that the action might fairly be supported on a count that stated the bill to be payable to bearer, and there being such a count in the declaration, they gave the plaintiffs judgment upon it. Vide Bennet v. Farnell, 1 Camph. 180.

[The principles stated in the text with regard to fictitious payees have been fully recognised in various courts in the United States. See Hunter v. Blodgett, 2 Yeates, 480, which was an action brought against the acceptor of a bill drawn by the same firm of Livesay and Co., mentioned above, and payable to a fictitious payee: and Mussi v. Lorain, 2 Browne, 56.

In an action by the endorsee against the makers of a note, it was declared on as payable to Moses Foster, or order, and by him endorsed. The endorsement was made by Moses Foster of Milford; the defendants contended that Moses Foster of Andover was the person intended. The jury found that the plaintiff had always possessed the note, which was given for money loaned by him to one of the defendants, and

It was for some time unsettled whether it was not essential that a bill or note should be payable either to order, or to (73) bearer, but it is now decided that it is not.

But where the bill or note is payable otherwise than to the bearer, it must show who is to be the payee.

Uncertainty as to the person to whom the payment shall be

"that no person of the name of Moses Foster had ever possessed any interest in the note, or been particularly intended as payee." Woodbury J. said, "When a note is made payable to the name of some person, not having any interest, and not intended to become a party in the transaction, whether a person of such a name is or is not known to exist, the payee may be deemed fictitious." He said that where money passed between the parties, a recovery might in such case be had on the money counts; and that in the present case where only one of the makers of the note received the money, a recovery might be had on the note on a count alleging it to be payable to bearer, "after alleging that the nominal payee is fictitious." Foster v. Shattuck, 2 N. Hamp. Rep. 446.]

(73) Smith v. Kendal, 6 Term Rep. 123. In an action for money paid and lent, the defendant pleaded the statute of limitations, and the plaintiff replied a latitat sued out 26th Sept. 1793. A note was given in evidence, dated 25th June, 1787, and payable to the plaintiff three months after date; but it was not payable either to order or to bearer; and the Court, on consideration, held that it was a good note within the statute, that it was entitled to three days' grace, and consequently that the statute of limitations did not begin to run until those three days had expired, which was on 28th September, 1787, and therefore within six years of 26th September, 1793. See also Chadwick v. Allen, ante, p. 4. The old entries also describe the custom upon bills to be to pay the payee without adding any words to make them payable to order or to bearer. Lutw. 231. 277. 891. Vid. 17 Brownl. Rep. 77. Clift. 916; and see Lord Raym. 1545.

Rex v. Box, 6 Taunt. 325. Indictment for forging a promissory note. The note was as follows: "On demand we promise to pay Mesdames S. W. and S. D., stewardesses, for the time being, of the Provident Daughters Society, held at the Hope, Smithfield, or their successors in office, 64*l.*, with 5*l.* per cent. interest, value received this 7th February, 1815, for F. C. and Co. J. Forster." This society was not enrolled according to 33 Geo. 3. c. 34., so that these payees were not strictly stewardesses, nor could they legally have successors in office, and it was insisted that this was not in law a promissory note: but on a case for the opinion of the twelve judges, they were unanimously of opinion that it was: that it was not essential a note should be negotiable; that the description of stewardesses was one which went to designate the payees, and the note, if genuine, would have enured to them, and to the survivor of them, and the executors and administrators of such survivor; and the conviction of the prisoner was held right.

[It has been held in New York, in conformity with the English decisions, that a note is within the statute though not payable to bearer or order. Downing v. Backenstoes, 3 Cain. R. 137. Dutchess Cotton Manufactory v. Davis, 14 Johns. R. 238.]

made will prevent an instrument from being a bill or note: as, making it payable to *A. or B.* (74)

[So if no person be named as payee, the instrument is not a bill or note. (*w*)

It is held in South Carolina that a note by which the maker promises "*to pay to order*," without naming any payee, is payable to bearer, and may be sued on as such. (*x*)]

If a bill or note be issued with a blank for the payee's name, any *bonâ fide* holder may insert his own name as payee. (75)

And it may be declared upon as though his name had been inserted when the bill or note was made. (75)

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(74) Blankenhagen v. Blundell, 2 Barn. & Ald. 417. Declaration on a note by which it was stated that defendant promised to pay J. P. Dahmer or plaintiffs, or his or their order; another count stated Dahmer to be since dead: each count averred that the note was delivered to plaintiffs, and negatived payment to Dahmer: defendant demurred, and on argument the Court were clear this was not a note within the statute, because it was not payable in certain either to Dahmer or the plaintiffs, but the claim of either, or of the endorsee of either, might be defeated by payment to the other; and if it were not within the statute when issued, subsequent events could not make it so. It was urged, that in legal operation it was payable to Dahmer and plaintiffs, but the Court said they could not take that to be its operation, as the declaration was framed, and judgment was given for the defendant. [S. P. Walrad v. Petrie, 4 Wend. 575.]

[(*w*) In an action on the following memorandum—"Boston, 15th May, 1810. Good for one hundred and twenty-six dollars on demand. Gilman & Hoyt."—Mr. Chief Justice Parker, giving the opinion of the Court, said "It is not a negotiable promissory note. It is not payable to bearer. It is not a contract which, *ex proprio vigore*, constitutes a promise to whomsoever shall produce it. Its effect is nothing more than that of a memorandum to the parties to it, to operate as a promise to pay money; or a receipt for money; or proof of a sum of money to be accounted for, according to evidence to show the intention of the parties. It imports no promise to the holder without evidence that it was actually given to him." Brown v. Gilman, 13 Mass. R. 158. See also Douglas v. Wilkeson, post, ch. v. note 23.]

[(*x*) Davega v. Moore, 3 M'Cord, 482.]

(75) Cruchley v. Clarance, 2 M. & S. 90. In an action by the payee of a bill against the drawer, it appeared that defendant drew the bill in Jamaica, and sent it to England with a blank for the payee's name; that it was put into negotiation here, and afterwards paid to the plaintiff for an old debt, without the blanks being filled up; and that he inserted his own name as payee: plaintiff had a verdict; and on motion for nonsuit or new trial, the Court held plaintiff warranted in inserting his own name, for by leaving the blank the defendant authorized any *bonâ fide* holder to fill it up, and the rule was refused.

But, until the blank is filled up, it is not a bill or note. (76) Unless, perhaps, where it may be considered in legal operation as payable to the order of the drawer.

Giving a payee a wrong description, if there be no doubt as to the person, is of no (77) consequence.

Sect. 11.—The (78) name of the person making it must be

Cruchley v. Mann, 5 Taunt. 529. Plaintiff brought another action on the same bill against the acceptor: one objection was that the blank was filled up without Clarance's authority, and Clarance gave in evidence that he did not authorize the insertion; but it appeared that Clarance had passed the bill to Vashon, that Vashon had passed it to plaintiff, and that defendant accepted it under Clarance's eye and at Clarance's instance, after plaintiff's name was inserted; the court was clear that Clarance's consent must be implied, and a rule for a new trial was refused.

Atwood v. Griffin, 1 Ryan & M. 425. A bill was issued, payable to or order: it was *bonâ fide* passed to P. Groves, and he filled up the blank with his own name, and endorsed it to plaintiffs. Plaintiffs declared upon it as if P. Groves's name had been inserted as payee when the bill was made. It was insisted that this insertion vacated the bill, or made a new stamp necessary, or at least that it was misdescribed, for it was not *ab origine* payable to P. Groves. But Best C. J. thought it an answer to all the objections, that P. Groves had a right to insert his own name, and that the defendant (the acceptor) had virtually engaged to be answerable upon it when it should be in the form a *bonâ fide* holder had a right to give it.

(76) Rex v. Randall, Trin. 1811. The prisoner was indicted for forging a bill of exchange: the bill was payable to or order (leaving a space for the payee's name), and was in appearance a navy-bill for an officer's wages; the point was saved for the consideration of the judges, whether this could be deemed a bill, there being no payee: it was urged that such a bill authorized any proper holder to fill up the blank as he might choose; but the judges held it was no bill till the blank was filled up, and recommended it to the judge who tried the prisoner to apply to the Crown for his pardon.

(77) See Rex v. Box, ante, p. 29.

(78) Taylor v. Dobbins, Str. 399. The declaration upon a note stated that the defendant wrote it with his own hand, but did not allege that he signed it, and an exception was taken on that ground. Sed per cur. "If the defendant wrote it, his subscription to it was unnecessary; it is sufficient if his name appeared in any part. 'I, J. S. promise to pay,' is as good as 'I promise to pay,' subscribed 'J. S.'"

Elliot v. Cowper, Str. 609. Lord Raym. 1376. 8 Mod. 307. It was objected on demurrer to a declaration on a note, that it alleged only that the defendant made it, but did not state that he signed it; but by the Court, "if he did not either write or sign it, he did not *make* it, for making implies signing, and making is alleged." Judgment for plaintiff.

inserted in the body, or subscribed at the bottom of every bill or note, and every bill or note must be written or signed by the person making it, or some one authorized by him for that purpose.

The clerk, who signs bank notes, need not have authority for that purpose under the common seal. (79)

And now by 1 Geo. 4. c. 92. s. 3. his signature may be impressed by machinery.

The signature to a bill or note must import to bind at all events each person who signs it. A note signed "A. B. or else C. D." is not, as against C. D., binding as a note. (80)

If A. sign his name upon a blank paper stamped with a bill-stamp, and deliver it to B. to draw such bill as B. may choose thereon, A. (81) is the drawer of such bill, to which the stamp is applicable, as B. shall draw thereon.

Smith v. Jarves, Lord Raym. 1484. The declaration upon a note drawn by Jarves and Baily, stated that Jarves for himself and partner made his note in writing with his own hand subscribed, whereby he promised for himself and partner to pay. It was objected on demurrer, that it was not charged, that Jarves had signed the note for himself and Baily; but the Court held the statement showed that Jarves did sign for himself and Baily, and gave the plaintiff judgment.

Ereskin v. Murray, Lord Raym. 1542. In an action on a bill it was alleged that the plaintiff made his bill in writing, and thereby requested the defendant to pay. It was objected on error, that it did not appear that the plaintiff signed the bill; but it was answered, that the allegation that he made it, and required the defendant to pay, implied that his name was in it, (otherwise he could not request), and that he or somebody for him wrote it. Judgment for the plaintiff was affirmed.

(79) Rex v. Bigg, 3 P. Will. 419. On an indictment under 8 & 9 W. 3. c. 20. s. 36. for altering and erasing a genuine bank note, it was found upon a special verdict that the person who signed the note was employed by the company to sign notes, but that he had no authority under their common seal: an objection was taken, that an authority under their common seal was necessary: many other objections were taken, and what was the opinion of the judges upon each is not stated; but Mr. P. Williams, who argued for the prisoner, says the judges were divided, but the majority of the judges held it to be felony, and the prisoner was transported, not executed: the majority, therefore, must have thought an authority under the common seal not necessary.

(80) Ferris v. Bond, ante, p. 15.

(81) Collis v. Emett, 1 H. Bl. 313. Emett signed his name upon a blank paper stamped with a shilling bill-stamp, (the highest stamp then in force for bills,) and delivered it to Livesay and Co. that they might draw thereon such bill as they should please. They drew one for

Sect. 12.—The signature to a bill or note may be attested by a subscribing witness; but, in that case, no evidence can be given of such signature, unless such witness be produced, or his absence properly accounted for.

Negotiable bills or notes for 20*s.* or any greater sum not exceeding 5*l.* must be attested, and so must their endorsement. (82)

Sect. 13.—It was for some time matter of controversy whether it was not necessary that a bill or note should import to be for value received; it is now however settled (83) that it need not.

But notes for coals in ships in the port of London must, by 3 G. 2. c. 26. s. 7. 8. import to be for value received in coals; and a refusal to insert words to that effect, or taking a note without such words, subjects the buyer and master of the ship to a penalty of 100*l.* (84)

155*l.* at three months date, which was duly transferred to Collis and Co., and Collis and Co. sued Emett thereon. A special verdict was found, principally with a view to another point; the Court held Emett answerable, and the plaintiffs had judgment. See Russell v. Langstaffe, post. Pasmore v. North, post. Usher v. Dauncey, post.

(82) 17 Geo. III. c. 30.

(83) White v. Ledwich, B. R. Hil. 25 Geo. 3. A declaration upon a bill of exchange was demurred to, because it was not stated to have been given for value received, but the Court said, it was a settled point, that it was not necessary, and gave judgment for the plaintiff. The same point is ruled in Macleod v. Snee. Lord Raym. 1481. See also Fort. 282. 8 Mod. 267. 1 Barnard. 88. Lutw. 889. 1 Mod. Ent. 310. 1 Show. 497.

[See also Goshen Turnpike Company v. Hurtin, 9 Johns. R. 207; Dutchess Cotton Manufactory v. Davis, 14 Johns. Rep. 238; Peasley v. Boatwright, 2 Leigh, 195.

The doctrine of the text is questioned by Parker C. J. in Hemmenway v. Hickes, 4 Pick. 500.]

(84) By 3 Geo. 2. c. 26. s. 7, every contractor for coals on board any ship or vessel in the port of London, shall, at the time of the delivery of such coals, either pay for them in ready money, or, for such part as shall not be so paid for, shall give his promissory note or notes for payment thereof, expressing therein the words "value received in coals;" and by s. 8. all lightermen, or other buyers of or contractors for coals, who shall refuse to give their notes for coals to them respectively delivered, and shall refuse to insert the words "value received in coals," and every such master (*i. e.* master of a ship or vessel with coals in the port of London) who shall take any such note from any dealer in coals,

The omission will not, however, make the note void. (85)

Sect. 14.—A memorandum on a bill or note before it is issued, may, in some instances, be considered as part of the bill or note, and control its operation: (*y*)

As, a memorandum, that if any dispute shall arise respecting the consideration, the bill or note shall be void. (86)

But, a memorandum upon a note to state where it shall be payable, is not. (87)

Nor is a memorandum of acceptance on a note payable after sight. (88)

Nor is a memorandum by way of direction to the payee's executors, in case of his death. (89)

Nor a memorandum which cannot be read for want of an agreement stamp. (89)

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in which note the words "value received in coals" are not expressly inserted, such lightermen, buyers of or contractors for coals, and masters, shall, for every such refusal or acceptance, respectively forfeit 100*l*.

(85) Per Holroyd J. 1 Stark. 463.

[(*y*) As to the effect of a memorandum, see Sanders v. Bacon, post, p. 36.]

(86) See Hartley v. Wilkinson, ante, p. 17.

(87) Exon v. Russell, 4 M. & S. 505. At the bottom of a promissory note was written "At Messrs. Brown and Co.'s, bankers, London." In an action against the maker, the declaration alleged that defendant made the note, and thereby promised to pay, &c. and made the same payable and to be paid at the house of certain persons described as Messrs. Brown and Co.'s: there was no averment or proof of presentation at Brown and Co.'s; and on a rule nisi for a nonsuit for want of such proof, and cause shown, the Court held that as the "At Messrs. Brown and Co.'s" was a memorandum only, and no part of the note, it was a misdescription to state it as part of the legal effect of the note itself to make it payable there, and on that account the rule was made absolute. [See also Williams v. Waring, 10 B. & C. 2; S. C. 5; M. &. R. 9.]

(88) Splitgerber v. Kohn, 1 Stark. 125. Endorsee against maker on a note made in Prussia, and payable seven days after sight: in the margin were these words, "Accepted on myself, payable everywhere," and these words were on the note when it issued; it was urged that they altered the nature of the note, and should have been noticed in the declaration; but Lord Ellenborough said they constituted no part of the original instrument: they were merely an acknowledgment of a sight of the note; and though they were contemporaneous with the note, their effect was in point of law subsequent.

(89) Stone v. Metcalfe, 1 Stark. 53. 4 Campb. 217. In an action by payee against maker on a note for 1000*l*. and interest, payable months after date, there appeared to be a memorandum endorsed upon

Nor one which has an attesting witness, and cannot be read on account of his absence. (89)

[A memorandum at the bottom of a note payable on demand, below the maker's signature, in these words, "One half to be paid in 12 months, the balance in 24 months," if written before the note is passed to the payee, forms a part of the note, and limits the generality of the words "on demand," in the body of the instrument. (*z*)

Parol evidence is admissible to show when, by whom, and under what circumstances the memorandum was affixed to the note. (*z*)

But parol evidence is not admissible to vary the meaning of the words of the memorandum, as by showing that the agreement for a credit was provisional, namely, if the maker should remain solvent. (*z*)

The words "for renewal," written at the foot of a note, do not affect its negotiable quality. (*a*)

And a note, with an endorsement upon it, stating the con-

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the note, but that memorandum was attested by J. S.: it was urged for defendant that he had a right to have the memorandum read as well as the note: but per Lord Ellenborough, "Plaintiff is entitled to have the note read, having proved defendant's hand-writing; but the endorsement may be an unconnected instrument." J. S. was then called, and proved the endorsement, which was as follows: "Although the within note is payable in months, my will and desire is that it shall not then be called in, and if defendant shall wish for further time, he shall have it without suit at law until three years after my decease;" it was urged that this endorsement made part of the note, and that neither of them could be read, because, taken together, they required an agreement-stamp. Sed per Lord Ellenborough: "I have on one side a perfect note, and on the other that which, if stamped, might have operated as a defeasance, but at which, for want of a stamp, I cannot look: but if the words were incorporated, they are words of mere indulgence and favor. As to the executors, the case might be different." The plaintiff had a verdict.

[(*z*) Haywood v. Perrin, 10 Pick. 228.]

[(*a*) In an action by the endorsee against the endorser of a note the words, "for renewal" appeared written near the bottom of the note. These words were proved to be generally understood to mean that the note was intended to meet, or be substituted for, some preceding note: and it was contended that the plaintiff ought therefore to prove himself a *bonâ fide* holder. But the Court said, "we are of opinion that the words, *for renewal*, did not destroy the negotiable quality of the note." Peirce v. Butler, 14 Mass. R. 303.

sideration for which it is given, is still a promissory note within the statute. (*b*)

The words "*ne varietur*" written upon a note by a notary at the time it is made, do not restrain the negotiability of the instrument. (*c*)]

Sect. 15.—The act of drawing a bill implies an undertaking from the drawer to the payee, and to every other person to whom the bill may afterwards be transferred, that the drawee is a person capable of making himself responsible for its payment, that he shall, if applied to for the purpose, express in writing upon the bill an undertaking to pay it when it shall become payable, and that he shall then pay it: and subjects the drawer on a failure in any of these particulars to an action at the suit of the payee or holder.

[A bill of exchange after acceptance may be considered as an assignment of the drawer's funds in the hands of the drawee. In cases also where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund; and after notice to the drawee it binds the fund in his hands.

[(*b*) On a note made by the defendants in the common form, payable to Sanders and Ogden, the plaintiffs, was an endorsement signed by the defendants, saying that the note "is to be delivered" to Sanders and Ogden in consideration of a judgment and execution in favor of S. & O. against S. Tyron "to be assigned to the subscribers." A question was made whether this note could be declared on as a note within the statute. Per Curiam. "The note was well declared upon, as a promissory note within the statute. The endorsement was no part of the note, the effect of it was only to show the consideration, and to operate as a notice to any person who might purchase the note. The delivery of the note was presumptive evidence of an assignment of the judgment, and it stood good, until overthrown by proof on the part of the defendants to the contrary." Sanders v. Bacon, 8 Johns. R. 379.]

[(*c*) Fleckner in Louisiana gave notes for the purchase money of an estate, payable to the vender or order. The notary before whom the contract of sale was executed wrote on each of the notes the words, "*ne varietur*." In an action by an endorsee of one of the notes, Story J. delivered the opinion of the Court. "There is not the slightest evidence, that by the law or custom of Louisiana the introduction of these words affects the negotiability of these notes: without proof of such law or usage this Court certainly cannot infer the existence of such an extraordinary and inconvenient doctrine." Fleckner v. U. S. Bank, 8 Wheat. R. 338. S. P. Chalaron v. Vance, 7 La. R. 571.]

But where the order is drawn either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consents to the appropriation by an acceptance of the draft. (*d*)]

The making of a note is an express engagement to the payee, or person to whom it shall be transferred, to pay the money mentioned therein, according to its tenor.

[A note takes effect from the time of its delivery, not from its date. The payee of a note cannot recover on it, unless it has been delivered to him. But where the note is in his possession, the law will presume a delivery, unless the contrary is proved. (*e*)]

[(*d*) Mandeville v. Welch, 5 Wheaton, 277.
See also Tiernan v. Jackson, 5 Peters, S. C. Rep. 580, in which the same principles are recognised, and see Debesse v. Napier, 1 M'Cord, 106.

Where the payee of a note, lodged it and other demands, with an attorney for collection, and afterwards drew an order on the attorney, requesting him to pay to a third person the amount which might be collected on the demands left with him, which the attorney accepted, to pay such sums as he might receive after obtaining what might be due to himself, the Supreme Court of Maine appeared to consider the order as not being an assignment of the note. No notice was given the maker of the assignment in this case. Thayer v. Havener, 6 Greenl. 212.]

[(*e*) Woodford v. Dorwin, 3 Verm. R. 82.]

CHAP. II.

Sect. 1. *Parties to a Bill or Note.*
2. *Infants.*
3. *Femes Covert to bind herself.*
4. *Bankrupts.*
5. *Several Persons not connected in Partnership.*
6. *Partners or Corporations.*
7. *Agents.*
8. *Persons standing* en auter droit.
9. *Aliens.*

A bill or note cannot properly be made or endorsed by, nor can a bill be properly addressed to any person incapable of making himself responsible for the payment, nor can they be properly made payable or endorsed to any person incapable of suing. (*a*)

Sect. 2.—Therefore, a bill or note cannot properly be made or endorsed by, nor can a bill be properly addressed to, an infant (1); except, perhaps, where it is drawn, endorsed, or accepted for necessaries. (2)

[(*a*) A note made payable to "the heirs" of a person still living, is good; as the persons intended are sufficiently described. 1 Root, 181.]

(1) Williams v. Harrison, Carth. 160. 3 Salk. 197. In an action against the drawer of a bill, the defendant pleaded infancy, and the plaintiff demurred, and the Court held clearly without argument, that infancy was a good bar; for the bill was drawn by the defendant as a trader in course of trade, and not for necessaries.

[The promissory note of an infant carrying on trade as adult, cannot be enforced against him by the payee, who received it in the course of business, without knowing the defendant's nonage. Van Winkle v. Ketchum, 3 Cain. R. 323.]

(2) Williamson v. Watts, 1 Campb. N. P. C. 552. In an action against the acceptor of a bill, the defendant pleaded infancy, and the plaintiff replied that the bill was accepted for necessaries, on which issue was joined: on opening the case, Sir J. Mansfield C. J. said, "This action certainly cannot be maintained. The defendant is allowed to be an infant, and did any one ever hear of an infant being liable

But if an infant draw a bill to his own order, and endorse it, and the drawee accept it, the acceptance will bind the drawee, and he will be compellable to pay the endorsee, because, by accepting, he precludes himself from disputing the competence of the drawer. (3)

[So, it has been held in Massachusetts, that if an infant endorse a note, an action may be maintained upon it by his endorsee against any of the prior parties. (*b*)]

And the drawing, endorsing, or accepting by an infant, is

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as an acceptor of a bill of exchange? The replication is nonsense, and ought to have been demurred to." He said as the point of law was so clear, he felt strongly inclined to nonsuit the plaintiff; but he heard the evidence, and the plaintiff was nonsuited, on proof that the goods, for which the bill had been given, were not necessaries. See Trueman v. Hurst, 1 T. R. 40.

[It has been held in New York that a negotiable note given by an infant for necessaries is void. Swasey v. Vanderheyden, 10 Johns. R. 33.

So also in New Hampshire. But the note's being void is no bar to an action for the necessaries for which it was given. M'Crillis v. How, 3 N. H. R. 348.

In South Carolina, on the other hand, a note given by an infant for necessaries is held to be valid. Dabore v. Wheddon, 4 M'Cord, 221.]

(3) Taylor v. Croker, 4 Esp. N. P. C. 187. In an action against the acceptor of a bill, drawn by Eversfield and Jones on the defendant, in their own favor, and endorsed by them to one S. and by him to the plaintiff; it appeared that both the drawers were infants at the time of drawing the bill. But Lord Ellenborough held, that though that might have been a good defence had the action been brought against the drawers themselves, it was no defence in the present action. Verdict for the plaintiff.

[(*b*) Withington made a note to Vose, a minor, in payment for his services; Vose for a valuable consideration endorsed it to Bacon, who passed it to Nightingale, all the parties knowing Vose to be a minor. Withington, after having notice of the endorsement, paid the amount of the note to Vose's father. The Court held that this payment was no defence to an action upon the note by Nightingale against Withington. Parker C. J. "That an infant may endorse a negotiable promissory note, or a bill of exchange, made payable to him, seems to be well settled." "Whether an infant may avoid an endorsement so made, and oblige the promiser to pay him, is a question not arising in this case; for there has been no countermand or revocation of the order to pay, which is implied in his endorsement. If an action should be brought against the infant as endorser, without doubt he may avoid such action by a plea of infancy. But that is a personal privilege which none but himself can set up, in avoidance of any contract in his favor." Nightingale v. Withington, 15 Mass. R. 272.]

voidable only, not void (4), and if he ratify the act after he comes of age, it will bind him. (*e*)

And it is no objection that the drawee of a bill was an infant when the bill was drawn, if he were of age when he accepted it. (5)

As an infant is capable of suing (6), he may be a payee or endorsee.

But it may be questionable, in some cases, whether payment should not be made to his guardian. (7)

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(4) Gibbs v. Merrill, 3 Taunt. 307. A bill was accepted by Merrill and Le Blond; Le Blond was an infant. An action being brought against Merrill only, he pleaded that he did not undertake unless jointly with Le Blond. Replication that he did; plaintiff proved Le Blond's infancy, and defendant proved by Le Blond, that he had never disaffirmed the acceptance. The jury found for the plaintiff; but on a rule nisi for a new trial, and time to consider, the Court held Le Blond's acceptance voidable only, not void; and that the issue should have been found for the defendant; they therefore set aside the verdict, but gave the plaintiff leave to amend his replication by stating Le Blond's infancy, and so raising the question whether he was compellable to join him.

[(*e*) Dutch, whose partner, Green, was a minor, made a note in the partnership name. Green, after coming of age, being applied to for payment, said that he would endeavor to procure the money and send it to the plaintiffs, the payees. Parker C. J. who delivered the opinion of the Court, said, that this evidence was sufficient to satisfy the jury that Green had ratified the original promise: that no letter of attorney was necessary to authorize Dutch to make this note; and that the note at its inception was only voidable as to Green, not void; and therefore that he might ratify it after he came of age. Whitney v. Dutch, 14 Mass. R. 457.

See 1 Root, 477; Wright v. Steele, 2 New Hamp. R. 51.]

(5) Stevens v. Jackson, 2 Rose, 284. 4 Campb. 164. 165. Plaintiff was an infant when a bill upon him was drawn, but he was of age when he accepted it. Gibbs C. J. was clear the acceptance bound him.

(6) See Teed v. Elworthy, 14 East, 210. Warwick v. Bruce, 2 Maule & S. 205. 6 Taunt. 118.

(7) See Pothier pl. 166. who observes, that payment to an infant will be no discharge of the debtor, unless it appear that the payment were beneficial to the infant; if the money were applied to his advantage, the payment will be good; if not, as where the infant squanders it, the party paying will not be discharged. So money *lent* to an infant for necessaries, if duly applied, may in equity be recovered from him. Marlow v. Pitfield, 1 P. Williams, 558. Though it is otherwise at law, 1 Salk. 279. 386. But if an executor pay a legacy to an infant, which the infant's father obtains and dissipates, the executor will be answerable to the infant. Phillips v. Paget, 2 Atk. 80. See also Pothier on Obligations, part iii. ch. 1. art. 2. s. 1. pl. 504. and s. 2.

Sect. 3.—Bills or notes cannot properly be made, endorsed, or accepted by a feme covert, unless where she acts by authority from her husband (8); or where she resides here, and he is under a civil incapacity of being in this kingdom. (9)

Her living apart from her husband, and having a separate maintenance secured by deed (10), or her trading by particular custom on her own account (11), gives her no capacity to draw, endorse, or accept.

[But where a bill is drawn and endorsed by a married woman in her own name, in the presence and by the consent of her husband, and he afterwards negotiates, without endorsing it, the property in the bill passes to the endorsee, who can sue the acceptor on it. (*d*)]

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(8) Barlow v. Bishop, 1 East's Rep. 432. Ann Parry was married, but traded in her own name, with her husband's consent. She became indebted to the plaintiff, and to enable her to pay him, the defendant, who knew that she was married, gave her a note payable to her or order. She endorsed it in her own name to the plaintiff, and he brought this action. Lord Kenyon thought it not maintainable, but saved the point; and after a rule nisi for a nonsuit, and cause shown, he said it was clear that the delivery of the note to the wife vested the interest in the husband; that as he permitted her to trade on her own account, and this was a transaction in the course of that trade, he was not prepared to say, that had she endorsed the note in his name, it would not have availed; the jury might have presumed that she was authorized by her husband; but the endorsement being in her own name, it was impossible to say it could pass the husband's interest. Rule absolute.

Cotes v. Davis, 1 Camp. N. P. C. 485. In an action by an endorsee against the maker of a note made payable to "Mrs. Carter, or order," and endorsed by her in her own name, the defendant offered to show that Mrs. Carter was wife to one Cole; but it being proved, that subsequently to the endorsement, and when the note was presented for payment, the defendant had promised to pay it, Lord Ellenborough said the jury might presume that she had authority from her husband to endorse the note, and *that* in the name by which she passed in the world. Verdict for the plaintiff.

(9) Vide Derry v. Duchess of Mazarine, Lord Raym. 147. Salk. 116. Sparrow v. Carruthers cited Blackst. 1197. 1 Term Rep. 6. See also Blackst. 1081, 1082. 1 Term Rep. 9.

(10) Vide Marshall v. Rutton, 8 Term Rep. 545.

(11) Vide Blackst. 1081. Cundill v. Shaw, 4 Term Rep. 361. But see also Lacie v. Phillips, Burr. 1776.

[(*d*) Prestwick v. Marshall, 5 M. & P. 513; S. C. 7 Bing. 565, and 4 C. & P. 594.]

Though a tradesman cannot write, and his wife write for him whatever is requisite in his trade, he will not be liable upon a bill or note signed by her, unless there is some evidence that it was signed by her in respect of his trade (12);

(Though she sign it in his name (12);)

Or that he has recognised it. (12)

If a bill or note be made payable, or endorsed to a feme covert, whose husband is under no civil incapacity, the wife alone cannot, except as agent to her husband, make it available, or sue upon it; (13)

The husband may.

And he may either negotiate it;

Or sue upon it.

And he may either sue upon it in his own name, and treat it as if it were made payable to himself; (14)

Or sue upon it in the joint names of himself and his wife. (15)

[And a note payable to husband and wife, goes to the wife, if she survive him. (*e*)

A note given to a feme covert for her separate use, for the

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(12) Smith v. Pedley, MS. 1824. In an action by the endorsee of a note against defendant as maker, it appeared that defendant could not write, that his wife wrote for him whatever was requisite, and that this note was signed by the wife in his name; but there was no evidence that the note was given on account of any concerns of the husband; it was, however, left to the jury to presume it was given for the husband's concerns; and the jury found for the plaintiff. But on a rule nisi for a new trial, the Court thought there was nothing to warrant such presumption by the jury, and a new trial was granted.

(13) See Barlow v. Bishop, ante, 41.

(14) Arnold v. Revoult, 1 Brod. & Bingh. 443.

(15) Philliskirk v. Pluckwell, 2 M. & S. 393. Note to a feme covert; action thereon by her and her husband. Rule nisi for a nonsuit; but, on cause shown, the Court held that as a note primâ facie imported a consideration according to its tenor, and the wife might have been the meritorious cause of it, or it might have been given for a debt due to her before marriage, the husband might suffer her to join in suing upon it, and the rule was discharged.

[(*e*) A note and mortgage were made to husband and wife, to secure the purchase money of land which had belonged to the wife. It was held that the note and mortgage survived to the wife, and did not go to the husband's administrator. Draper v. Jackson, 16 Mass. R. 480.]

consideration of her distributive share in an intestate estate, becomes immediately the property of the husband. (*f*)

Where a bill is drawn in favor of a married woman, in an action against the drawer by her husband, the defendant cannot object that she was not authorized to demand payment of the drawee; and a presentment by her is sufficient. (*g*)

Where a married woman lent money to her husband which belonged to her as an administratrix, and took a note signed by her husband and two others for the amount, payable to her with interest, it was held that though she could not sue on the note during the husband's life, she might at any time within six years after his death sue the other parties. (*h*)]

Sect. 4.—If a bill or note be made payable to an uncertificated bankrupt or order, the bankrupt's endorsee may sue the drawer of the bill or maker of the note; because, as against these parties the form of the bill imports that the bankrupt is capable of endorsing. (16)

At least he may, if he took the bill or note bonâ fide and for value, and the assignees do not oppose his claim. (16)

[(*f*) Commonwealth v. Manley, 12 Pick. 173.]
[(*g*) Cathell v. Goodwin, 1 Har. & Gill. 468.]
[(*h*) Richards v. Richards, 2 Barn. & Adol. 447.]

(16) Drayton v. Dale, 2 Barn. & Cr. 293. Defendant made a note in 1818, payable to Clarke or order: Clarke endorsed it to Knight and Freeman, to whom he was indebted, and plaintiff gave Knight and Freeman the amount in money. Neither Knight, nor Freeman, nor plaintiff, knew the circumstances under which the note was given: it was, in fact, given for a debt Dale owed Clarke before November, 1814. In November, 1814, Clarke became bankrupt, and Clarke had arranged with one of his assignees to take this debt upon himself: plaintiff having sued defendant, defendant pleaded first the general issue, upon which plaintiff had a verdict; and secondly, Clarke's bankruptcy, and that therefore the right to endorse was in Clarke's assignees. Plaintiff replied, that Clarke's assignees consented to the endorsement to him; but, he failed in proving that plea, and that fact, therefore, was found against plaintiff. On special case as to the general issue, including the question whether the special plea was valid, or whether plaintiff should not have judgment notwithstanding the verdict on that plea; the Court was clear upon argument, that as the assignees did not dispute plaintiff's right, it was not competent for defendant, who by the form of the note had held out that the plaintiff was capable of endorsing, to contend that he was not; and they awarded judgment to plaintiff.

And if a bankrupt sue upon the bill or note, it is an answer to his suit that his assignees have required the defendant to pay them. (17)

Sect. 5. — If several, who are not partners, join in a note, and it begins with, "I promise," &c., it is several as well as joint, and it will bind each individual separately; (18)

And all jointly. (19)

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(17) Kitchen v. Bartsch, 7 East, 53. Assumpsit on two notes of 15th August, 1801, payable to plaintiff. Plea, a commission of bankruptcy against plaintiff in June, 1801, and that the assignees had required him to pay them. Replication, that the notes were made after the assignment under the commission; that defendant treated with plaintiff as a person capable of receiving credit; and that there was no new assignment to the assignees: on demurrer, the plea was held good, the replication bad.

(18) Clark v. Blackstock, Holt, 474. A note was in this form: "I promise to pay plaintiff, or order, 30*l.* with interest, value received: Thos. Jackson, Jno. Blackstock." In an action against Blackstock alone, two objections were made: one, that this was the joint note of Jackson and Blackstock; and, secondly, that there should have been an additional stamp for Blackstock's signature; it was ruled that the word "I" made the note several as well as joint; and, secondly, that the necessity of an additional stamp would depend upon this, viz. whether Blackstock's signature was part of the original bargain before plaintiff took the note, or an afterthought; and it appearing to have been part of the original bargain, verdict for plaintiff.

March v. Ward, Peake, 130. A note signed by Bowling and Ward began, "I promise to pay," and in an action against Ward alone, it was objected that the note was *joint only*, and not several; but Lord Kenyon held it was several as well as joint, and said it had been so decided on a case from Chester. *I* applies to each severally." Verdict for the plaintiff.

Hall v. Smith, Hil. 1823. 1 Barn. & Cr. 407. A note was in this form: "I promise to pay the bearer on demand one pound, value received: for Wm. Smith, W. P. Smith, and W. R. Taylor; Wm. Smith." An action being brought on this and several similar notes against W. Smith alone, he pleaded in abatement that he did not undertake, unless jointly with W. P. Smith and W. R. Taylor; but on issue inde and case, the Court held that, though this might bind the whole firm jointly, it bound the defendant separately; that upon the form of the note he was the only promising party, and after having used that form it was not for him to complain that he was sued separately; and that by requiring a joint action, a plaintiff would be bound at his peril to prove that all the partners he sued were partners, and that was a risk to which the form of the note did not import to make him liable.

(19) Lord Galway v. Matthew, post, n. 24.

[See also Hemmenway v. Stone, 7 Mass. R. 58. Hunt v. Adams, post.]

And it requires only one stamp, if it were the bargain before it was issued that all should join. (20)

But if there were no such bargain, the addition of a fresh signature after it was once issued would make a new stamp necessary. (20)

[Where a joint and several note is signed by several parties, all are liable to a joint action, or each one to a separate action. (*i*)

And where judgment has been recovered against one party in a separate action, a joint action cannot be maintained against the others. (*i*)

If two persons sign a joint and several note, and afterwards a third person signs it, with the knowledge and consent of one of the first makers, but without the knowledge of the other, the three are not liable as joint makers of the note. (*k*)

Where A. and B. signed a note together, A. as principal and B. as surety, though B.'s being surety did not appear on the face of the note, and afterwards the holder wishing for more security, A. procured C. to sign the note as surety. C. having paid the note, it was held that he could not maintain an action against A. and B. jointly for what he had paid, but that he could sue B. for a contribution as joint surety with him. (*l*)

If a person, not the payee of a note, signs upon the note at the time it is made, an acknowledgment that he is holden as surety for the payment of the note, or endorses an undertaking to pay the note, he is liable as a joint and several maker. (*m*)

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(20) See Clark v. Blackstock, ante n. 18.

[(*i*) Bangor Bank v. Treat, 6 Greenl. 207.]

[(*k*) Ives v. Pickett, 2 M'Cord. 271.]

[(*l*) Lapham v. Barnes, 2 Verm. R. 213.]

[(*m*) Chaplin made a note for $1500 payable to Bennet. Before the note was delivered to Bennet, Adams signed the following agreement written upon the note. "I acknowledge myself holden as surety for the payment of the demand of the above note." Bennet's administrator brought an action against Adams, declaring, 1. Upon a note signed by the defendant solely; 2. On a note made by him jointly and severally with Chaplin. Parsons C. J. delivered the opinion of the Court. "The defendant is an orignal party to the contract. This mode of signing entitles the defendant, if he pays the note, to an indemnity

So if a note written "We A. B. as principal and C. D. as surety," be subscribed by A. B. and endorsed by C. D., C. D. is liable as a joint maker. (*n*)

So if a person, not the payee of a note, endorses his name upon it at the time it is made, intending to make himself responsible to the payee, he is liable as an original promiser. (*o*)

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from Chaplin. But, as to the intestate, they must be considered as joint and several promisers. The legal effect of this note does not differ from one written 'For value received *I* promise to pay,' &c. and signed by one with 'principal' annexed to his name, and by another with 'surety' thus annexed." Hunt v. Adams, 5 Mass. R. 358. In another action between the same parties on another contract not materially varying from the above, the Court continued of the same opinion. Hunt v. Adams, 6 Mass. R. 519.

Taber, April 19th, 1806, made a note payable to White on demand. The note was endorsed, "Ap. 19th, 1806. For value received we jointly and severally undertake to pay the money within mentioned to the said Wm. White. John Coggeshall, Jr. John H. Howland." White sued Howland on the note, and in one count as a several original promiser. No demand or notice was proved; and Taber became insolvent in 1810. Curia. "We are all satisfied that this case is within the reason of Hunt v. Adams (supra) and that the effect of the defendant's signature is the same as if he had subscribed the note on the face of it as a surety. He is then answerable as an original promiser, equally with Taber, and the count which charges him as a several original promiser is supported by the note in its actual form." White v. Howland, 9 Mass. R. 314. See also Carver v. Warren, 5 Mass. R. 545.]

[(*n*) Palmer v. Grant, 4 Conn. R. 89.]

[(*o*) Moies sold an estate to B. Bird, who agreed to pay for it in part by a note with a sufficient endorser, and proposed to give one of his brothers, Abraham or William, as an endorser or security on the notes. The deed was given, and B. Bird gave his notes payable to Moies. A day or two afterwards one of the notes was brought to Abraham Bird, to procure his endorsement. He at first refused to endorse it, saying that it was not negotiable; but finally said he would write his name, to make Moies easy, but would not be accountable for a farthing. Moies sued A. Bird, declaring on a promissory note made by him. Sewall C. J. directed the jury, that if Moies conveyed the land to B. Bird upon the expectation of security by the endorsement of Abraham or William Bird as guarantor, and had obtained the defendant's endorsement in consequence of that understanding, they might find for the plaintiff, unless the endorsement had been in fact made with some different intent; and that the endorsement in blank by the defendant was of the same effect as a signature upon the face of the note under the name of B. Bird, in which case the defendant would be considered as surety for B. Bird. On motion for a new trial, Parker C. J. who delivered the opinion of the Court, said, that the effect of the defendant's signature "was to make him absolutely liable to pay the note. He leaves it to the holder to write any thing over his name, not inconsistent with the

But if there be no evidence to show that the person so endorsing intended to make himself responsible to the payee, no action can be maintained by the payee against such endorser. (*p*)

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nature of the transaction. The holder chooses to consider him as a surety binding himself originally with the principal: and we think he has a right so to do." Moies v. Bird, 11 Mass. R. 436.

See also Sumner v. Gay, 4 Pick. 311. S. P. Baker v. Briggs, 8 Pick. 122; and Frampton v. Dudley, 1 Nott & M'Cord, 128. In the last case the authority of Hunt v. Adams, 5 Mass. R. 358, is recognised, though it was held that the plaintiff could not recover under his declaration. See also Guidrey v. Vives, 15 Martin, 659.

The plaintiff in one count declared that in consideration of plaintiff's selling Brundige a horse, the defendant guarantied the payment of Brundige's note, given in payment. The evidence was a note made by Brundige payable to the plaintiff or bearer, and endorsed in blank by the defendant. The plaintiff offered to prove the sale of the horse, upon the defendant's agreeing to become surety for the payment, and the making of the note in pursuance of that agreement. Spencer C. J. delivered the opinion of the Court. "Under the count on the guaranty the evidence offered was admissible, unless indeed, the promise is within the statute of frauds. I confess, I do not perceive that this case is at all within the statute; the defendant's promise is not to pay on the default of Brundige, but is an original undertaking; and the defendant is as much holden as if he had signed the body of the note." Nelson v. Dubois, 13 Johns. R. 175.

But in a case in Virginia, where A. put his name on the back of a bill payable to B., at the time it was made, it was held that he was not liable to the payee, on the ground of want of consideration. The facts proved are not fully stated. But the declaration stated the endorsement to have been made to give credit to the bill, and in consideration of the money paid to the drawer, and a verdict was found for the plaintiff. Fitzbugh v. Love, 6 Call, 5. According to common principles of law, if A.'s endorsing the bill formed any part of the inducement of the payee to buy it of the drawer, a sufficient consideration seems to be made out.]

[(*p*) See Herrick v. Carman, post.]

Wheeler agreed to sell goods to Moore and Abdy on their giving a note with a good endorser. They afterwards brought him a note signed by them payable to Wheeler, and endorsed in blank by Tillman, and Wheeler then sold them the goods entirely on the credit of Tillman. Wheeler sued Tillman as guarantor; and obtained a verdict in the C. Pleas. Yates J. delivered the opinion of the Court. "For aught that appears Tillman may have put his name on the note as second endorser, on the responsibility of the payee; this is the legal presumption from the appearance of the paper, without any explanatory proof, or a special undertaking on the part of Tillman, who does not appear to have known any thing of the original contract between the drawers and payee; nor can the Court infer from any thing in the case, that he was privy thereto." Judgment reversed. Tillman v. Wheeler, 17 Johns. 326.]

Where such an endorsement is made at the time of making the note, it seems that the endorser will be considered as a surety, without any other evidence. (*q*)

But the blank endorsement, by A. of the note of B. payable to C. or order, does not, of itself, imply that A. for value received of C. promised C. that B. was of ability to pay and should pay said note, and cannot be declared on as such a contract. (*r*)

It is, however, held in Massachusetts, that such an endorsement made after the note is passed to the payee, will bind the endorser as a guarantor, if any legal consideration for his endorsement can be proved. (*s*)

[(*q*) Baker v. Briggs, 8 Pick. 122.]

[(*r*) Wylie v. Lewis, 7 Conn. R. 201.]

[(*s*) Ulen held notes of Butman payable to himself. Kittredge, in consideration of farther time being given, agreed to become security, and endorsed the notes in blank; and being requested by Ulen's agent, to write something over his name, he answered that his name was enough, and that if he wrote it in full, it would not make it stronger. Ulen sued Kittredge as guarantor. By the Court. "We are of opinion that the defendant's name endorsed, with the authority given by him to the plaintiff's agent, to write over it a sufficient guaranty, such guaranty being accordingly written by him, may be considered as a memorandum signed by the party, within the intent of the statute, as fully as if it had been written in the defendant's presence immediately after the signature. And parol evidence was as well admissible to prove this authority, as it is in any case upon a promise in writing, to prove the hand-writing." Ulen v. Kittredge, 7 Mass. R. 233.

Tenney held a note of Pierce, dated Dec. 1, 1820, payable in twelve months from the date with interest after six months. Three months before it became due, Prince endorsed it. Tenney wrote over Prince's name, "Eastport, Dec. 1, 1820, For value received I promise to pay Perley Tenney or order the within sum, being 824 dollars 65 cents, in twelve months from date, with interest after six months," and brought an action against Prince on this promise. It was held, that the action in this form would not lie. Parker C. J. in giving the opinion of the Court said, "It is impossible to infer an original promise to pay this note coeval with its date, from a signature put upon it nine months after. But this signature is not without effect; it was intended as security to the plaintiff, and it ought to avail as intended. The only form of engagement which is consistent with the time and circumstances under which the signature was made, is a guaranty of the payment of the note when it should become due, and that is a contract which may be enforced, if it was made on legal consideration, and not otherwise. If within the statute of frauds, it is sufficiently in writing, with the engagement to that effect which the plaintiff is authorized to place over the signature, to be sustained. But whether within the statute or not, it cannot avail the plaintiff without proof of consideration, be-

Parol evidence has been held to be admissible to show that such an endorser was not to be bound as a joint and several maker, but that the signer on the face of the note was to be first sued, and the endorser was to guaranty the payment. (*t*)]

If a bill or note be payable to several persons, not in partnership, the right to transfer is in all collectively, not in any individually. (21)

And an endorsement by and in the name of one only, will not give the endorsee a right to sue. (21)

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cause it is a collateral, not an original undertaking. The action in its present form cannot be sustained; but if it is supposed a consideration can be proved, the plaintiff has leave to amend his declaration and his endorsement over the signature, and a new trial is granted." Tenney v. Prince, 4 Pick. 385.

On a new trial of this case evidence was produced by the plaintiff, that the defendant had said he was willing to pay it in land, and that after he endorsed it, Pierce secured him by putting real estate into his hands, which he was willing to transfer to the plaintiff, and that either the plaintiff or defendant said that the plaintiff in consequence of the endorsement had forborne to sue the maker. It was held, that there was not sufficient evidence of a consideration for the endorsement. Tenney v. Prince, 7 Pick. 243.

A different doctrine appears to be held in New Hampshire. R. and J. Houghton, the makers of a note, being applied to by Corbin, the agent of Hodgkins, the payee, for payment, offered security, if farther time should be given. They then procured Bond to endorse his name on the note; and Bond said that he was holden. Corbin some time after wrote a guaranty over Bond's name: and Hodgkins sued Bond as guarantor. Bell J. said, "This is not an action against the party to the original contract. The undertaking of the defendant must be considered as collateral to the original undertaking. It was strictly a promise to pay an existing debt of another." The Court held, that the action was not maintainable, because there was no memorandum in writing signed by the party, within the meaning of the statute of frauds. Hodgkins v. Bond, 1 N. Hamp. 284.]

[(*t*) Barrows v. Lane, 5 Verm. R. 161.]

(21) Carvick v. Vickery, Dougl. 2d ed. p. 653. n. 134. A bill was drawn by father and son, who were not partners, payable *to their own order*. The son alone endorsed it; and, upon an action by his endorsee against the acceptor, Lord Mansfield thought an endorsement by both parties essential, and nonsuited the plaintiff. A new trial, however, was afterwards granted, the Court, after time taken to consider, being of opinion that, by making the bill payable to their own order, the father and son had made themselves partners as to this transaction; but upon the second trial Lord Mansfield said, he did not think the question so decided as to preclude evidence which was offered, that by the universal usage and understanding of all the bankers and merchants in London the endorsement was bad, as not being signed by both the payees, and the jury, una voce, declared that that was the

So if a bill be drawn on several persons not connected in partnership, an acceptance by one will bind him (22) only.

[Where a note is written for the purpose of being signed by a number of persons, one who signs it is not liable to the payee, unless all sign, or unless he waives his rights with a knowledge of the facts. (*u*)

Where a note signed by A. and three other persons, the last three being sureties for A., was afterwards signed by a fifth person, B., who wrote the word *surety* after his name, and the note was afterwards discounted, and B. was obliged to pay it; it was held that B. could not recover in a joint action against the four first signers, he was to be considered as a co-surety with the other sureties, in the absence of evidence showing that they intended to stand as principals in regard to B. (*v*)

The admission by one of the original sureties, that B. signed as surety for all the makers of the note, will not bind his co-sureties, they not being partners. (*v*)

If one of several persons, jointly liable on a bill or note, whether partners or not, dies solvent, and the survivors become insolvent, the assets of the deceased are liable in equity to the payment of the bill or note. (*w*)]

Sect. 6.—Each partner has in general a power to bind the partnership; and, therefore, a bill or note by one, or an endorsement or acceptance by one, will in general bind all. (23)

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usage and understanding, and without hearing any evidence upon the point they found a verdict for the defendant.

[Where a note is payable to two joint executors, one of them cannot transfer the note by his separate endorsement. Smith v. Whiting, 9 Mass. R. 334. See also Bank of Chenango v. Root, 4 Cowen, 126. Ballou v. Spencer, 4 Cowen, 163; Lowell v. Reding, 9 Greenl. 85.]

(22) Bull. Nisi Prius, 279. In the case of two joint traders, an acceptance by one will bind both; but if ten merchants employ one factor, and he draw a bill upon them all, and one accept it, this shall only bind him and not the rest. Mar. 2d ed. 16. Beawes, s. 228. 1st ed. p. 444. Molloy, b. 2. c. 10. s. 18.

[(*u*) Leaf v. Gibbs, 4 C. & P. 466.]

[(*v*) Warner v. Price, 3 Wend. 397.]

[(*w*) Jenkins v. De Groot, 1 Cain. Er. 122; Van Reimsdyk v. Kane, 1 Gallis. 630.]

(23) Mason v. Rumsey and another, 1 Campb. N. P. C. 384. A bill was drawn on "Messrs. Rumsey and Co.;" and T. Rumsey, jun.

And a note by one, importing to be for all, may bind the partnership, though it may begin, "I promise." (24)

[Where one partner has authority to draw and endorse bills for the firm, if a bill be drawn by him in a fictitious name, and endorsed by him in the partnership name, and the proceeds applied to partnership purposes, all the partners are liable on the endorsement to the persons from whom the money was obtained. (*x*)

But where a bill is drawn by one partner in his own name, the members of the firm will not be liable as drawers, though the bill is drawn to raise money for the benefit of the firm, and the money raised by it is so applied. (*y*)]

If a partnership carry on business in the name of one member only, a bill or note by him in his name, or an endorsement or acceptance by him, will bind the firm (25), if the

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wrote upon it "Accepted, T. Rumsey, sen." The present action was defended by T. Rumsey, jun. who contended that, even if he were a partner (which he denied), this acceptance would not bind him. Lord Ellenborough told the jury, that if the defendants were partners, they were both bound by this acceptance. He said the word "accepted" alone would have been sufficient, and that the effect could not be altered by the addition of "T. Rumsey, sen." The jury found for the plaintiff; and on motion afterwards for a new trial, on the ground of the evidence of partnership not having been sufficient, the Court held the direction right, and refused a rule.

[See also Winship v. Bank of the United States, 5 Pet. S. C. R. 529; Forbes v. Andrews, 2 Penn. R. 160.]

(24) Lord Galway v. Matthew and another, 1 Campb. N. P. C. 403. This was an action against the defendants as surviving partners of T. Whitsmith, on a note drawn thus: "Sixty days after date, I pay Lord Viscount Galway, or order, 200*l.* value received. For J. Matthew, T. Whitsmith, and T. Smithson (Signed) "J. Matthew." Lord Ellenborough held that it bound the whole firm. S. C. 10 East's Rep. 264.

This signature by the one (presuming his authority) is a good signature by all. See Wilks v. Back, 2 East, 142.

[(*x*) Thicknesse v. Bromilow, 2 Crom. & Jer. 425.]

[(*y*) Le Roy v. Johnson, 3 Pet. Sup. C. R. 86.]

(25) South Carolina Bank v. Case, 8 Barn. & Cr. 427. Crowder, Clough, and Perfect carried on the business of commission merchants in England and America: in England, under the firm of Crowder, Clough, and Co.; and in America, in the name of Clough only. The business of each house was to procure consignments for the other. Clough procured a consignment in America for the English house; and it was arranged between the consignor and Clough, that the former should draw upon a house at New York in favor of Clough, and that Clough should endorse the bills to enable the consignor to get them

bill, &c. were given upon a partnership transaction: otherwise, not. (26)

[Where a partnership is carried on under the name of one of the partners only, and he endorses a note in his own name, the firm is not bound thereby, unless the note was received or discounted as a note binding on the partnership, upon a representation to that effect by the partner giving the same, or the note was in fact made for the benefit of the partnership. (*z*)

But where money has been procured by the partner in whose name the business is carried on, by discounting a note endorsed by him on the credit of the partnership, a subsequent misapplication of the funds by him, will not exonerate the other partners. (*a*)

Where a partnership is carried on under the name of one

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discounted, and that the consignor should also draw upon the English house to put the New York house in cash to provide for the bills on them: Clough accordingly endorsed in his own name the bills on the New York house, and plaintiffs discounted them; and Crowder, Clough, and Perfect having failed, plaintiffs claimed to prove under their commission. The Vice-Chancellor directed an issue to try whether the house were indebted to plaintiffs; and on case and argument, and time to consider, the Court was of opinion that Clough's name was, under the circumstances, to be considered the name of the firm for the purposes of business in America; that his endorsement, therefore, though in his own name only, was the endorsement of the house, and that the house were consequently liable as endorsers. Postea to the plaintiffs.

(26) Ex parte Bolitho, 1 Buck. 100. Isaac and Peter Blackburn carried on business near Plymouth in the name of Isaac Blackburn only; Peter was only a secret partner; Peter carried on a separate business in London. They became bankrupts, and the Bank of England and Down and Co. proved against their joint estate upon bills drawn in the name of Isaac, payable to Peter, and discounted for Peter; the joint creditors petitioned that the proofs against the joint estate might be expunged: it was urged in support of the proof, that as the partnership business was carried on in Isaac's name, the holder of the bills had a claim upon the partnership, on the ground that the bills were drawn in what was the partnership name: sed per Lord Eldon, "unless you can show that when Isaac drew the bills, he drew them, not as Isaac, but as Isaac and Peter, there can be no legal contract upon the bills against the two: there may be a right of action, if you can bring it to this, that the money was raised by them for partnership purposes; but this I cannot decide; I must send it to a court of law." Issues were accordingly directed to try whether Isaac and Peter were jointly liable, 1st, upon the bills, or, 2dly, for money lent.

[(*z*) United States Bank v. Binney, 5 Mason, 176. See also Winship v. The Bank of the United States, 5 Peters S. C. R. 529, S. C.]

[(*a*) Winship v. The Bank of the United States, 5 Pet. S. C. R. 529.]

partner only, who also carries on other business on his own account, the other partners are not *prima facie* liable on a note signed by him. And in order to charge the other partners on such a note, the burden of proof is on the holder to show that the signature was intended for the signature of the firm. (*b*)

In an action on such a note given for goods purchased, the other partners are not liable, unless the purchase is made on behalf of the firm, and is within the scope of the authority of the partner whose name is signed to it. (*c*)

If the other partners, however, know of the purchase being made for the firm, though not within the partner's authority,

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[(*b*) John Winship carried on the soap and candle business at Charlestown, in partnership with John and Amos Binney, under his own name; but he was extensively engaged in other business, in which it did not appear that they had any concern.

In an action by the Manufacturers and Mechanics' Bank against the partners on a note signed John Winship, the jury found specially that the note was discounted at the bank, on the belief that the Binneys were liable as copartners in the manufactory at Charlestown only; that the copartnership was generally believed to exist, by those who had dealings with them, and was limited to the manufacture of soap and candles; and that the note was not discounted to raise money for the business of the firm. No evidence was given at the trial on this last point, but the jury were instructed, that the burden of proof on this point being upon the plaintiffs, of course, if there was no evidence offered, they should find the fact for the defendants.

Putnam J., who gave the opinion of the Court, said, "The rule that a note or draft given in a partnership name, shall, in the hands of an innocent holder, be *prima facie* considered as having issued for the partnership account, must be confined to cases where the signature or other circumstances indicate a partnership concern. In such case the burden of proof would rest upon the defendants. They might show that the partnership name had been misapplied, and that the holder knew that the paper was made for the account of the individual, and without the knowledge of the other partners." "If it had been proved that the note had been given for the use of the firm at the manufactory, the partners in that concern would be liable." "But the case at bar was left without any evidence upon that point, and the direction of the Chief Justice seems to have been perfectly correct, that the burden of proof was on the plaintiffs. The partners are not to be charged unless upon their contract, and no recovery is to be had against them so long as it remains doubtful whether they have or have not made the contract declared upon." Manufacturers & Mechanics' Bank v. Winship, 5 Pick. 11.

In a similar case, Story J. said, "Where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, there, in order to bind the firm, it is necessary not only to prove the signature, but that it was used as a signature of the firm, by a party authorized to use it on that occasion and for that purpose. In

and make no objection, they will be liable on the note, though they might not know that the purchase was on credit. (*c*)]

If two trades be carried on at the same place under the same firm, a bill endorsed in the name of the firm by the partners in the one trade, will bind the partners in the other trade, as between them and an innocent holder. (27)

A bill or note by one partner in the name of the firm will, as between them and an innocent holder, bind the firm, though the partner making it were prohibited from drawing bills or notes. (28)

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other words, it must be shown to be used for partnership objects, and as a partnership act. The proof of the signature is not enough." "The burden of proof is upon the plaintiffs, to establish, that it is a contract of the firm, and ought to bind them." U. S. Bank v. Binney, 5 Mason, 176.]

[(*c*) Woodward v. Winship, 12 Pick. 430.]

(27) Swan and others v. Steele and Wood, 7 East, 210. The house of Wood and Payne carried on, under the same firm and at the same counting-house, two trades, those of wholesale grocers and cotton dealers. The defendant Steele was a secret partner in the latter trade, but not in the former. The house was indebted to the plaintiffs, as grocers, and to pay this debt, Wood and Payne, without the knowledge of Steele, endorsed to the plaintiffs a bill which they had received on account of the cotton concern. The bill was endorsed in the usual firm of W. and P., and Steele's being a partner was unknown to the plaintiffs. Wood and Payne afterwards became bankrupts, and Payne being dead, this action, by the plaintiffs as endorsees of the bill, was brought against Steele and Wood; and on a case reserved, the only question was, whether the endorsement were good: the Court held the case too clear for argument; and Lord Ellenborough said, that in the absence of all fraud on the part of the endorsee, there was no doubt that such endorsement would bind all the partners. Postea to the plaintiffs.

[See also Winship v. Bank of the United States, 5 Pet. S. C. R. 529; Bank of Kentucky v. Brooking, 2 Litt. 41.]

(28) Lord Galway v. Matthew and Smithson, 10 East's Rep. 264. The defendants and Whitehouse (since deceased) were in partner hip as brewers. Matthew applied to the plaintiff to lend his acceptance for 200*l.*, to enable him to pay excise duties due from the house, and promised in return to give the note of the firm payable four days before the acceptance. The plaintiff gave his acceptance, and Matthew drew the note and signed it for himself and partners. He then got the acceptance discounted, and applied 180*l.* in payment of partnership debts, reserving the rest to himself. The plaintiff (after Whitehouse's death) was obliged to take up his acceptance, and now sued the defendants on the note. Matthew suffered judgment by default; but Smithson proved that the plaintiff, before he took the note, had received notice of an advertisement by him, warning persons not to trust Matthew on his account, and that he would no longer be liable

Or though the particular bill or note were a fraud upon the partnership. (29)

But, such bills or notes will not bind the partnership as to persons, who, when they took them, knew of the want of authority; (28)

Or of the fraud. (30)

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for drafts drawn by the other partners on the partnership account. Lord Ellenborough held, that the plaintiff having taken the note after such warning, could not recover, and therefore nonsuited him; and on motion to set aside the nonsuit, the Court held it right, and refused a rule.

(29) Ridley and another v. Taylor, 13 East's Rep. 175. Ord and Ewbank were linen-drapers and partners. The plaintiffs, in Nov. 1806, sold a cargo of coals to Ewbank for 34*l.* 11*s.*, and Ewbank in May following gave them 5*l.* in part payment, and a promissory note for the balance. The note was dishonored; and in payment of this balance, Ewbank, on the 7th of Nov. 1807, gave the plaintiffs a bill for 40*l.*, dated 20th of October, 1807, drawn and endorsed by him in the partnership name, and accepted by the defendant. The bill was drawn, endorsed, and accepted before it was produced to the plaintiffs, and it did not appear that they knew that Ewbank's was the hand by which it had been drawn and endorsed. Ewbank afterwards applied to the plaintiffs for the difference between the balance due and the 40*l.*, but they refused to pay it, until payment of the note. The bill was dishonored; and the plaintiffs in their account debited Ewbank for the amount. Ord and Ewbank afterwards became bankrupt, and the plaintiffs now sued the defendant as acceptor. A verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench on a case, stating these facts. The Court held, that in this case, there being no evidence of covin between the plaintiffs and Ewbank to defraud Ord, and no such gross negligence on the part of the plaintiffs, in not inquiring whether Ewbank had authority to transfer the bill, as to render the transaction fraudulent, the plaintiffs were entitled to recover; and they held, that Ord or Ewbank might have been called to disprove Ewbank's authority. The plaintiffs had judgment for the amount of Ewbank's debt.

[In Maryland in 1799, it was held that a bill of exchange accepted by one partner in the partnership name in fraud of his partners, was not good in the hands of a *bona fide* holder. Brown v. Duncanson, 4 Har. & M'Hen. 350.]

(30) Shirreff v. Wilks and others, 1 East's Rep. 48. In October, 1795, Bishop and Wilks, who were then partners, became indebted to the plaintiffs for goods sold and delivered. Robson became a partner with Bishop and Wilks in April, 1796, and continued so until the 8th November following, when the partnership was dissolved. On 5th November, 1796, the plaintiffs drew on the partnership for the amount of their demand against Bishop and Wilks, and Bishop accepted the bill in the partnership firm. The plaintiffs now sued the three partners upon this acceptance. Bishop and Robson were outlawed; and Wilks pleaded the general issue. A verdict was found for the plaintiff, subject to the opinion of the Court. Lord Kenyon said he did not

[It is no objection to a note that it was made by one partner without the knowledge and consent of another partner, if the note was given bona fide for a partnership debt. (*d*)

But where one of the members of a firm endorses in the partnership name, a note given as security for a debt of the maker of the note to another person, who, when he receives the note, knows that it is endorsed as such security, the note in the hands of the creditor of the maker is not binding upon the partnership, unless the other partner is consulted before the endorsement is made, or subsequently assents to the transaction. (*e*)]

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know how the case came to be reserved, as he had repeatedly decided the same question at the sittings; the propriety of which decisions had not been canvassed. He said, the consideration of the bill was goods sold to Bishop and Wilks only, when Robson was not a partner. "Then the plaintiffs, knowing this, draw the bill on the three partners, and knowingly take an acceptance from one of them, to bind the other two, one of whom, Robson, had no concern with the matter, and was no debtor of theirs; no assent or knowledge on his part being found. The transaction is fraudulent on the face of it." The other judges concurred. Postea to the defendant.

Hope v. Cust, B. R. M. 1774, cit. per Lawrence J. in Shirreff v. Wilks, 1 East's Rep. 53. Fordyce traded on his separate account, as well as in partnership with others, and being indebted to Hope on his separate account, gave him a general guaranty in the partnership name for his own debt. Lord Mansfield left it to the jury, whether the taking of the guaranty was, in respect of the partners, a fair transaction; or covinous, with sufficient notice to the plaintiff of the injustice and breach of trust Fordyce was guilty of in giving it. The jury found for the defendant.

See also Pinkney v. Hall, 1 Salk. 126. Lord Raym. 175., and Wells v. Masterman and another, 2 Esp. N. P. C. 731; [and Heath v. Sansom, 2 B. & Adol. 291; Baird v. Cochran, 4 Serg. & R. 397; Livingston v. Hastie, 2 Cain R. 246; Lansing v. Gaine, 2 Johns. R. 300; Chazournes v. Edwards, 3 Pick. 5.]

Green v. Deakin, 2 Stark. 348. Hickman owed Green money, and gave him a draft for the amount in the name of himself and his two partners, Deakin and Bickley: neither Deakin nor Bickley knew of the giving this draft, nor had this been done with their concurrence; Green was not apprized that the other partners were ignorant of the transaction, and it was urged that Deakin should have given notice of his intention to dispute the consideration; sed per Lord Ellenborough, "the transaction is intrinsically notice: one partner has no right to bind another without his knowledge by drawing in the partnership name for his private debt." Nonsuit.

[(*d*) Smith v. Van Santvoord, 5 Cowen, 688.]

[(*e*) Laverty v. Burr, 1 Wend. 529. Sutherland J. in giving the opinion of the Court, said, "The partner who did not sign the note, is not bound by it under such circumstances, unless he was previously

If one partner give a partnership bill or note for his own private debt without the knowledge of the partnership, it is a fraud upon the partnership. (30)

And in such case, if an action be brought by such creditor, notice need not be given him that the consideration will be disputed; the nature of the transaction is sufficient notice to him. (30)

[And a person endorsing such a note as surety believing it to be good against the partnership, will not be liable upon it to the creditor to whom it is given, who knew it was for a demand against one partner. (*f*)

In such a case the burden of proof is on the holder of the note, to prove that the endorser knew the circumstances under which the note was made. (*g*)]

If one partner accept in the partnership name a bill drawn on the firm by his own separate creditor, for his separate debt (31); or if, for such separate debt, he give a promissory note in the name of the firm (32); it lies upon the creditor to show that his debtor had authority so to give him the joint security of the firm; primâ facie the transaction is fraudulent on the part of both debtor and creditor (*h*).

[In an action on a bill accepted in a partnership name by one of the partners, if it appear that the bill has been applied in part to the separate use of the partner who accepts it, with

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consulted and assented to the transaction, and the burden of proving that the partner who did not sign the note consented to be bound, is thrown on the creditor. (Dob v. Halsey, 16 Johns. R. 38; and Foot v. Sabin, 19 Johns. R. 157.) In England, the assent of the partner is presumed, and the burden of avoiding the security is thrown on the firm, and they are required to prove that the note was signed by one of the partners on his individual account, without the knowledge and against the consent of the others, and that the creditor knew that fact when he took the paper of the firm." He cited Livingston v. Hastie, 2 Cain. 246; Lansing v. Gaine, 2 Johns. R. 300; Livingston v. Roosevelt, 4 Johns. R. 251—as supporting this distinction between the English and American Law.]

[(*f*) Livingston v. Hastie, 2 Cain. R. 246; Chazournes v. Edwards, 3 Pick. 5; Williams v. Walbridge, 3 Wend. 415.]

[(*g*) Chazournes v. Edwards, 3 Pick. 5.]

(31) Shirreff v. Wilks. suprà.

(32) Green v. Deakin, suprà.

[(*h*) Williams v. Walbridge, 3 Wend. 415. See also Laverty v. Burr, ante.]

[It is no objection to a note that it ... can recover of the ner without the knowledge and co... has not to his knowledge the note was given bona fide. ... the partner who accepts

But where one of the ... partnership name, a r... maker of the note ... the note, knows ... in the hands ... the partne... the en... acti... partnership name to a note as makers, maker, the note cannot be against the firm, if he knew that the when he received the note, unless he or subsequent ratification of the other ...'s name being so used. (*k*)

So on a bill signed by one person with his own hand, and by another with the name of a partnership of which he is a member, with the word surety after the signature, the partnership is not liable, without proof of the assent of the partners to their being sureties on the bill. (l)

The defence that the note, signed in the name of a firm, was given by one partner for his private debt, is admissible under the general issue. (m)

If one partner knows that a note has been given in the partnership name by the other partner, for his private debt, and does not dissent or give notice to the payee of his dissent, till a long time after he knows of the giving of the note, it is held that he assents to the transaction, and is bound by the note. (n)]

If one of several persons who have been in partnership accept a bill in the partnership name after a dissolution of the partnership, the partnership will not be liable even to a bonâ fide holder for valuable consideration, if the dissolution took place after the date of the bill and before it became due, and proper means were taken to make the dissolution notorious. (33)

[(i) Wintle v. Crowther, 1 Crompt. & Jer. 316; S. C. 1 Tyr. R. 210.]
[(k) Bank of Rochester v. Bowen, 7 Wend. 158.]
[(l) Boyd v. Plumb, 7 Wend. 309.]
[(m) Williams v. Walbridge, 3 Wend. 415.]
[(n) Forbes v. Andrews, 2 Penn. R. 160.]

(33) Wrightson v. Pullan. 1 Stark. 375. Defendants, Pullan and Hopcroft, had been partners; but, on 13th February, 1815, their partnership was dissolved, and on 14th February notice thereof was published in the Gazette. After this date Taylor and Son drew upon Pullan and Hopcraft, and antedated the bill to 1st February, 1815. Hopcroft ac-

[A note signed in the partnership name before the dissolution, and delivered to the payee after the dissolution by one partner without the consent of the others, will not bind the members of the firm, as the note takes effect only from the time of its delivery. (*o*)

So a note issued by one partner in the partnership name, after the dissolution of the partnership, is not binding upon the partnership, even though it was given for a demand against the partnership (*p*); and antedated so as to appear of a date previous to the dissolution (*q*); unless the note be issued before public notice of the dissolution is given, and be in the hands of a person in fact ignorant of the dissolution, and not chargeable with notice of it. (*r*)

And a letter written by a firm, requesting leave to renew notes for a certain period, will not be an authority to one of the firm after the dissolution, but within the period specified, to bind the members of the firm by a note given in conformity with their request. (*s*)]

And if a dissolution be agreed upon, a person who knows of it cannot charge the partnership with a subsequent acceptance by one of the partners in the partnership name, unless he

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cepted this bill in the partnership name; after which, Taylor and Son paid it to plaintiffs for value. It was urged for plaintiffs, that as the bill was dated before the dissolution, and plaintiffs had taken it bonâ fide and for a valuable consideration, plaintiffs were entitled to recover upon it; but Lord Ellenborough held, that as the partnership had been dissolved before the bill was drawn, Pullan could not be charged by the subsequent act of Hopcroft: and the Court afterwards agreed with him, and refused a motion for a new trial.

[Tombeckbee Bank v. Dimell, 5 Mason, 56, which only differs from Wrightson v. Pullan in the circumstance that the bill was in fact drawn before the dissolution of the defendant's partnership was made public, though not accepted until afterwards. It was held that the acceptance, which was in the partnership name, only bound the individual by whom it was made.

See Kilgour v. Finlyson, 1 H. B. 155, as to an endorsement by one partner after dissolution of partnership; and Abel v. Sutton, 3 Esp. R. 108.]

[(*o*) Woodford v. Dorwin, 3 Verm. R. 82.]

[(*p*) Whitman v. Leonard, 3 Pick. 177; Bank of South Carolina v. Humphreys, 1 M'Cord, 388.]

[(*q*) See Lansing v. Gaine, 2 Johns. R. 300.]

[(*r*) Bristol v. Sprague, 8 Wend. 423.]

[(*s*) Bank of South Carolina v. Humphreys, 1 M'Cord, 388.]

the knowledge of the plaintiff, the plaintiff can recover of the partnership the rest of the bill which has not to his knowledge been applied to the separate use of the partner who accepts the bill. (*i*)

If one partner sign the partnership name to a note as makers, and in fact as sureties for another maker, the note cannot be enforced by the payee against the firm, if he knew that the partners were sureties, when he received the note, unless he can prove the assent or subsequent ratification of the other partner to the partnership's name being so used. (*k*)

So on a bill signed by one person with his own hand, and by another with the name of a partnership of which he is a member, with the word *surety* after the signature, the partnership is not liable, without proof of the assent of the partners to their being sureties on the bill. (*l*)

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If one of several persons who have been in partnership accept a bill in the partnership name after a dissolution of the partnership, the partnership will not be liable even to a bonâ fide holder for valuable consideration, if the dissolution took place after the date of the bill and before it became due, and proper means were taken to make the dissolution notorious. (33)

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(33) Wrightson v. Pullan. 1 Stark. 375. Defendants, Pullan and Hopcroft, had been partners; but, on 13th February, 1815, their partnership was dissolved, and on 14th February notice thereof was published in the Gazette. After this date Taylor and Son drew upon Pullan and Hopcraft, and antedated the bill to 1st February, 1815. Hopcroft ac-

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So a note issued by one partner in the partnership name, after the dissolution of the partnership, is not binding upon the partnership, even though it was given for a demand against the partnership (*p*); and antedated so as to appear of a date previous to the dissolution (*q*); unless the note be issued before public notice of the dissolution is given, and be in the hands of a person in fact ignorant of the dissolution, and not chargeable with notice of it. (*r*)

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[Tombeckbee Bank v. Dumell, 5 Mason, 56, which only differs from Wrightson v. Pullan in the circumstance that the bill was in fact drawn before the dissolution of the defendant's partnership was made public, though not accepted until afterwards. It was held that the acceptance, which was in the partnership name, only bound the individual by whom it was made.

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[(*q*) See Lansing v. Gaine, 2 Johns. R. 300.]

[(*r*) Bristol v. Sprague, 8 Wend. 423.]

[(*s*) Bank of South Carolina v. Humphreys, 1 M'Cord, 388.]

can prove that the intention to dissolve was abandoned, or that the acceptance was for a partnership transaction, and free from fraud. (34)

But a dissolution will not protect the retiring partners, if they suffer their names to continue on the partnership premises, and the holder of the bill or note took it bonâ fide, and for value, and without knowledge of the dissolution. (35)

[If a person who is a member of a partnership, but not known publicly as such, retires from the partnership, which is afterwards carried on in the same name, no public notice being given of the dissolution, he will not be liable on a bill or note to which the partnership became party after his withdrawal, to a person who never knew him to have been a member of the firm. (*t*)

If one partner, after committing a secret act of bankruptcy, accepts a bill in the partnership name for his own private debt, the partnership is liable on the acceptance to a *bonâ fide*

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(34) Paterson v. Zachariah, 1 Stark. 71. In an action against A. & B. upon an acceptance by A. in the joint names, they having been in partnership, the defence was, that the acceptance was in fraud of B, after a dissolution to which plaintiff was privy; and it was proved, that before the date of the bill plaintiff had, as attorney, prepared a deed of dissolution, and had sent it for approbation to B.'s attorney; but it did not appear the deed had been executed. Sed per Lord Ellenborough:—"You need not labor this; where an intention to dissolve is made known, and the dissolution is in the course of execution, the burthen is on the other side to show that the intention has been abandoned." Nonsuit.

(35) Williams v. Keats and Archer, 2 Stark. 290. In an action against defendants as acceptors of a bill, it appeared that they dissolved partnership 18th January, 1817, and that notice thereof was in the preceding night's Gazette; but, that the business (a hatter's) was carried on as usual by Keats, and that the name, "Keats, Archer, and Co." continued over the door till April; that the bill in question, though dated in December, was not drawn till February; that it was then accepted, in the old partnership name, by Keats; and that plaintiffs took it bonâ fide and for full value in March. Lord Ellenborough thought Archer's permitting his name to remain over the door was notice of a continuance of the partnership; and as there was no proof that plaintiffs knew of its dissolution when they took the bill, they had a right to recover: and they had a verdict accordingly.

[(*t*) Caster v. Whally, 1 B. & Adol. 11. See also Heath v. Sansom, 1 Nev. & Man. 105; S. C. 4 B. & Adol. 172.]

holder, although the partnership was perhaps dissolved in law by the act of bankruptcy. (*u*)

So if one of two partners, after the dissolution of the partnership, give a note in the partnership name on account of a partnership debt, and the other partner afterwards adopt and sanction the act, both partners are liable upon the note. (*v*)

A secret partner is liable on bills and notes on which the partnership name appears signed by the other partners, during the continuance of the partnership. (*w*)

But he is not liable on a bill or note on which the same partnership name was placed before he became a member of the firm, although by the agreement under which he entered into the firm, the partnership as to him was to be considered as commencing on a day prior to the making of the bill or note, this agreement affecting only the accounts between the parties themselves, not the rights of third persons. (*w*)

[(*u*) Woolcott and Tucker, who had been partners, were sued as acceptors of two bills, accepted by Woolcott in the partnership name. The acceptance and consideration were private transactions of Woolcott, unknown to Tucker, and not connected with the partnership business. Previously to these acceptances Woolcott had committed an act of bankruptcy, on which a commission subsequently issued. It was contended for the defendant, Tucker, that Woolcott having committed an act of bankruptcy previously to his accepting the bills, the partnership was thereby dissolved and he had no power to bind the firm by an exceptance in their name. But the Court said, "The case presents no difficulty. The plaintiffs are innocent endorsers, having taken the bills bonâ fide and for a valuable consideration. They see the acceptance of Woolcott and Tucker upon the bills; those persons were then in fact partners, so far as their joint transactions with the world could make them such; one of them indeed had previously committed an act of bankruptcy, and in law perhaps the partnership was dissolved. But they continued to hold themselves out to the world ostensibly as partners, and therefore each was bound by the acts of the other." Judgment for the plaintiffs. Lucy v. Woolcott, 2 Dow. & Ryl. 458.]

[(*v*) Taylor and Hall had been partners under the firm of John Taylor & Co. A year after the dissolution of the partnership, Taylor made a note to Eaton on account of a partnership debt. It was proved at the trial before Parker J. that Hall had paid 100 dollars on this note, which was endorsed on it with his knowledge. The judge instructed the jury, that if Hall had adopted and sanctioned the act of Taylor in signing the note for himself and Hall, they ought to find for the plaintiff, although no authority was given at the time of signing. Verdict for plaintiff. And on motion for a new trial the Court held that the direction to the jury was correct; but said that upon the whole case they should have been as well satisfied with a verdict for the defendant. Eaton v. Taylor, 10 Mass. R. 54.]

[(*w*) Vere v. Ashby, 10 B. & C. 288.]

If several persons are partners, and one of them signs a note with a name of partnership, all the partners will be bound, unless they can prove that that was not their partnership style. (*x*)

So in case of a limited partnership in a particular adventure, a note signed by one of the partners in a partnership name assumed for the occasion, and given for a debt arising in the partnership business, is binding upon all the partners. (*y*)

A partnership firm may make a note payable to one of the partners. And though he cannot sue the partnership, as he would be both plaintiff and defendant, a person to whom he endorses the note may sue the partnership upon it. (*z*)

Though each partner in a common trading partnership has authority to bind his partners by bills or notes, yet the directors of a mining company have no power to bind the other partners by bills or notes, without express authority, unless such a power is necessary to carry on the business, or it has been the practice of such companies to have bills drawn or accepted, or notes made in the name of the company. (*a*)]

No banking corporation, nor any banking partnership consisting of more than six persons, can issue in London, or within sixty-five miles thereof, any bill or note of such corporation or partnership, payable on demand; nor can they draw upon any person residing in London, or within sixty-five miles of it, any bill of exchange payable on demand, or for less than 50*l.*; nor can they borrow, owe, or take up in London, or within sixty-five miles thereof, any sum of money on any bill or promissory note of such corporation or copartnership, payable on demand

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[(*x*) Elwyn and P. and S. Wittaker were sued as partners, makers of a note. Elwyn signed the note Elwyn & Co. A partnership was proved, but not that the defendants traded under the name of Elwyn & Co. Kent J. delivered the opinion of the Court. "As such a signature imported a copartnership, and a copartnership did exist at the time between Elwyn and the other defendants, I think it is to be *presumed* that such was the name of the firm, and that it was sufficient to cast upon the defendants the burden of proving what was the name of the house or firm, if a different name existed." Drake v. Elwyn, 1 Cain. R. 184.]

[(*y*) Crumpston v. M'Nair, 1 Wend. 457.]

[(*z*) Smith v. Lusher, 5 Cowen, 688.]

[(*a*) Dickinson v. Valpy, 10 B. & C. 128. S. C. 5 M. & R. 126.]

or at any less time than six months from the borrowing thereof; and if they do, they are liable to the penalty of 50*l.* for each offence. (36)

And they are not at liberty to issue such bills or notes in England beyond the limited distance, except under certain restrictions.

Those restrictions are, that such bills or notes shall be payable at some place or places specified thereon, exceeding such limited distance; that the corporations or partnerships issuing them shall have no house of business or establishment, as bankers, in London or within sixty-five miles thereof; and that every member of such corporation or partnership shall be responsible for the due payment of all bills and notes issued by such corporation or partnership, such person being a member at the date of the bills or notes, or becoming so before they are payable, or while any sum of money on any such bills or notes is owing or unpaid; that they shall deliver in an account at the Stamp Office according to 7 Geo. 4. c. 46. before they begin to issue any bills or notes, and that they shall be subject to certain regulations that act specifies.

The Stamp Office account, which is to be in the form the schedule points out, is to set forth the true names, title, or firm, of such corporation or copartnership; the names and places of abode of all the members of such corporation or copartnership, as the same shall respectively appear in their books; the name and firm of every bank established by them; and also the names and places of abode of two members, resident in England, who shall have been appointed public officers of the corporation or copartnership; together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued, as thereinafter is provided; and also the name of every town and place where any of the bills and notes of such corporation or copartnership shall be issued.

This account is to be made out and verified upon oath by the secretary, or one of the public officers appointed as aforesaid;

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(36) 7 Geo. 4. c. 46.

is to be delivered to the commissioners of stamps, at the Stamp Office in London, to be there filed; is to be renewed every year between 28th February and 25th March; and a copy, certified to be such under the hand of one or more of the commissioners of stamps, shall, upon proof of his or their handwriting, and without proof of his or their being a commissioner or commissioners, be proof of the appointment and authority of the public officers named in such account, and that all persons named therein as members were members at the date of such account.

A further account is also to be delivered in within the year, if there be any change in the officers or members.

A neglect to make out and deliver this account in the first instance, or to renew it yearly within the specified days, subjects the corporation or copartnership to a forfeiture of 500*l.* per week for every week they shall neglect to make it: if the secretary or other officer make out or sign a false account, or an account not truly setting forth all the particulars required, the corporation or copartnership is liable to a penalty of 500*l.*, and the secretary or other officer so offending shall forfeit 100*l.*; and if the secretary or other officer shall knowingly and wilfully make a false oath of and concerning the matters to be specified and set forth in such account, he shall be liable to the pains of wilful and corrupt perjury.

All actions and suits by any such (37) copartnership, against members or others, shall, and lawfully may, be commenced and prosecuted in the name of one of the public officers nominated as aforesaid; all actions and suits against any such copartnership, by members or others, shall, and lawfully may, be commenced against one or more of such public officers; all indictments and prosecutions, on behalf of such copartnership, shall, and lawfully may, be preferred and carried on in the name of any one of such public officers, and it shall be lawful and sufficient to describe the property of the copartnership as the property of any of the public officers; and an

(37) The word "corporation" is omitted in this and several other clauses; query, whether by design or accident?

intent to injure or defraud any such copartnership shall, and lawfully may, be laid in any indictment as an intent to injure or defraud any one of such public officers; and the death, resignation, removal, or any act of such public officer shall not prejudice any action or other proceeding, but the same may be continued in the name of any other of the public officers of such copartnership.

There is to be only one action or suit against any such corporation or copartnership, in respect of one demand, in case the merits shall have been tried in such action or suit; and the proceedings therein may be pleaded in bar of any further action or suit for the same demand.

A decree in a court of equity against such public officer of such copartnership shall have the like effect against the property and funds of the copartnership, and against the person and property of every member, as if every such member were parties before the court, and every judgment against any public officer of any such copartnership shall have the like effect upon the property of such copartnership, and upon the property of every member thereof, as if the judgment had been obtained against such copartnership: and the bankruptcy, &c. of such public officer in his individual capacity is not to be deemed the bankruptcy, &c. of such copartnership, but the partnership and every member thereof, and the effects of the copartnership, and of every member thereof, shall be liable to the claims of the creditors, as if there had been no such bankruptcy, &c.

Execution upon any judgment in an action against any such public officer, may be issued against any member or members for the time being, of such corporation or copartnership; and if such execution against any member or members for the time being be ineffectual for obtaining satisfaction, execution may be issued against any person or persons, who was or were a member or members at the time when the contract or the engagement, on which such judgment was obtained, was entered into, or who became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: provided that no execution, as last mentioned, shall be issued without leave first

granted, on motion in open court, by the court in which such judgment shall have been obtained; and such motion shall not be made except on notice to the person sought to be charged, nor after the expiration of three years after he shall have ceased to be a member.

The public officer in whose name a suit or action shall have been commenced or defended, and the person against whom execution upon any judgment shall be issued, is to be indemnified out of the funds of the copartnership, or, in failure thereof, by contributions from the other members of such copartnership, as in the ordinary cases of copartnership.

And if any such corporation or copartnership issue or reissue in London, or at any place not exceeding sixty-five miles from London, any bill or note of such corporation or copartnership payable on demand, or drawn on any person resident in London, or at any place not exceeding sixty-five miles from London, any bill of exchange payable on demand, or for less than 50*l.*; or if they issue any of their bills or notes, contrary to 39 & 40 Geo. 3. c. 28., save as provided by this act; such copartner or copartners shall forfeit for every such offence 50*l.* (38)

Before this statute the different bank acts contained prohibitions as to partnerships consisting of more than six persons (39); and it had been held that those prohibitions did not extend to any but banking partnerships. (40)

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(38) 7 Geo. 4. c. 46. s. 19.

(39) 6 Ann. c. 22. s. 9.—15 Geo. 2. c. 13. s. 5.—21 Geo. 3. c. 60. s. 12.—39 & 40 Geo. 3. c. 28.

(40) Wigan v. Fowler, 1 Stark. 459. In an action against seven partners, as makers of a promissory note for 1000*l.* payable three months after date, the defence was, that the bank acts made this note void: the number of partners did not appear upon the face of the note, nor was there any evidence that plaintiff knew it. Lord Ellenborough thought at the trial, that the bank acts applied to banking partnerships only, and it was with reluctance he saved the point. On motion to enter a nonsuit, he adhered to his original opinion; and it was noticed that plaintiff did not appear to have known how many partners there were when he took the note: the rule was refused.

Perring v. Dunston, 1 Ryan & M. 426. In an action upon a note, it appeared to be made by seven persons, and it was insisted that it was therefore void as an infringement of the privilege granted to the bank by 21 Geo. 3. c. 60. s. 12; but, Best C. J. thought, that taking all the

At least, a common partnership could not have made this a defence against an innocent holder, who was ignorant of what number the firm consisted. (41)

[In most of the States of the United States the privilege of issuing bank paper, *i. e.* notes payable to bearer on demand, intended to circulate as money, is confined to certain incorporated banks; and all other individuals or corporations are prohibited from issuing such notes.]

Corporations are mentioned in the statute of Anne, as persons who may make or endorse notes, and to whom notes may be payable; and as it gives the like remedy to and for corporations and others as upon inland bills of exchange, it implies, that by the custom of merchants they might, in some cases at least, draw, endorse, accept, or sue upon, bills of exchange.

But if the being parties to bills or notes were inconsistent with the purpose for which they were incorporated, that inconsistency might be a bar to any remedy by, or through, or against them, on a bill or note.

And where a corporation is empowered by statute to raise money by notes for a special purpose, if it issue notes without stating therein that they were given for that purpose, the corporation may resist payment, on the ground that they were given for another purpose. (42)

And this will be a defence even against an innocent endorsee. (42)

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bank acts together, the object of the legislature was to give protection against rival banks only: and it not appearing that this note had any relation to persons in partnership for the purposes of banking, plaintiff had a verdict, but it was by consent, and for defendant's proportion only.

(41) Wigan v. Fowler, supra

(42) Slark v. Highgate Archway Company, 5 Taunt. 792. Defendants were incorporated by 52 Geo. 3. c. 146. (local and personal) and authorized to borrow money to complete their works: they gave a note under their common seal at two months after date for 1000*l.*, payable to Nash or order; it did not import to be for money borrowed to complete their works. Plaintiff sued thereon as endorsee. Defence, that it was given for Nash's accommodation, not to complete their works. Gibbs C. J. thought this no defence against an innocent endorsee who had paid the value, and the plaintiff had a verdict; but, on a rule nisi for a new trial, the Court of Common Pleas, without assigning their reasons, granted a new trial.

The Royal Bank of Scotland has power to issue notes. The power is sufficiently recognised by 48 Geo. 3. c. 149. s. 14. and 55 Geo. 3. c. 184. s. 23. (43)

And this is the case also with the Bank of Scotland; (44)

And with the British Linen Company in Scotland. (44)

[A corporation authorized by the act of incorporation to employ their stock solely in advancing money on goods, and the sale of such goods on commission, may lawfully accept bills of exchange, on an agreement of the drawer to deposit goods; the legislature not having required that the goods should be delivered to the company prior to their advancing money on them. (*b*)

So a corporation is bound by a note given by its authorized agent on account of a demand against the corporation, although there is no special clause in its act of incorporation authorizing it to issue notes. (*c*)]

Sect. 7.—Where a bill or note is drawn by an agent, executor, or trustee, he should take care, if he mean to exempt himself from personal responsibility, to use clear and explicit words to show that intention.

Thus, if a broker sell goods, and draw upon the buyer in favor of his principal, he will be liable upon the bill, if it be dishonored, unless he use special words to prevent it; (45)

And may be sued thereon by his principal. (45)

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(43) Vide post.

(44) Rex v. M'Keay, Pasch. 1826. Prisoner was indicted for disposing of a forged 1*l.* note of the Royal Bank of Scotland. A charter was proved enabling the Bank to increase its capital, and a clerk proved that the Bank was in the constant habit of issuing such notes, but no charter was proved giving them such power: on referring to 48 Geo. 3. c. 149. s. 14. and 55 Geo. 3. c. 184. s. 23., Hullock B., who tried the prisoner, thought such power was sufficiently recognised by those statutes, and the other judges agreed with him.

[(*b*) Munn v. Commission Co. 15 Johns. R. 44.]

[(*c*) Mott v. Hicks, 1 Cowen, 513.]

(45) Lefevre v. Lloyd, 5 Taunt. 749. Defendant, as broker, sold cotton for plaintiff at two months' credit, and drew on the seller for the amount in favor of plaintiff: the bill being dishonored, plaintiff sued defendant on the bill; and Gibbs C. J. at the trial, held, that as defendant had put his name upon the bill, however imprudent that was, all

So, if an agent for A. draw upon B. in favor of C., though he direct B. to place the amount to A.'s debit, he will be personally liable to C., if the bill be not paid, unless he use proper words to prevent such liability. (46)

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the legal consequences of that act attached upon him, and verdict for plaintiff: and on motion for a new trial, the Court agreed with him; for by drawing the bill, defendant removed from plaintiff all consideration of the buyer's responsibility. Rule refused.

(46) Leadbitter v. Farrow, Michaelmas, 1816, in B. R. Plaintiff wanted a bill upon London for 50*l*., and sent to defendant, whom he knew to be agent to the Durham Bank at Hexham: defendant drew a bill accordingly, "Pay to the order of Mr. Leadbitter 50*l*., value received, which place to the account of the Durham Bank, as advised, C. Farrow. To Messrs. A. and B. London." In an action thereon, the defendant urged that he was not personally liable, or at least that the plaintiff, who knew him to be only agent, could not sue him: but, on a case reserved, the Court held his signature pledged his own credit, and *that* only, and that he was therefore liable.

[Prince was agent of Higginson, and drew eight bills payable to Mayhew on Higginson, Dodge, and Co. of which house Higginson was the principal, directing them in the bills to place the amount to the debit of Higginson. Mayhew sued Prince as drawer, and the defence set up was, that the defendant was a mere agent of Higginson, for whose use and on whose account the bills were drawn, and that the plaintiff knew that the defendant acted as agent in drawing the bills. Parker J. delivered the opinion of the Court. "The defendant drew the bills putting his own name to them without qualification. He must therefore be considered the responsible drawer. The signer of any contract, if he intends to prevent a resort to himself personally, should express on the contract the quality in which he acts; otherwise he does not bind the party who employs him, and necessarily binds himself." Mayhew v. Prince, 11 Mass. R. 54. But see Van Reimsdyk v. Kane, post.

In an action against the drawers of a bill drawn in Philadelphia upon Rotterdam, it appeared that the letters *q. q.* were added after the signatures of the defendants, which the counsel contended meant *qualitate qua*, i. e. in the capacity of agent of the drawees. The defendants offered to prove a custom of the Dutch merchants in Holland and the West Indies, that it was the general understanding of the parties to such bills, that no recourse could be had against the drawers, but that credit was given to the fund or estate on account of which they drew. But the Court refused to admit the evidence, not only because the bill was drawn in Philadelphia, but also because the general law of Europe with regard to bills could not be affected by the practice of the Dutch agents of sugar plantations. Verdict for plaintiff. Rheinhold v. Dertzell, 1 Yeates, 39.

But in a case in Pennsylvania, in an action by the payee against the drawer of a bill, the Court held that the defendant would be exonerated from his liability, by proving that between the payee and himself there was no consideration, and that the general understanding was that the drawer was merely an agent of the drawee, and not to be held

And this, though C. knew he was only agent. (46).

So, if drainage or inclosure commissioners draw upon the banker appointed by the act, they may be personally liable, unless they use proper words to prevent it; though the bill import to be drawn on the drainage or inclosure account, and direct the money to be placed to their account as commissioners. (47)

So, if a bill be addressed to a man as cashier of a particular company, though it direct him to place it to the company's account, an acceptance upon it by him will bind him personally, unless he use special words to prevent it. (48)

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responsible; and that it was not necessary to show a special agreement to exonerate him. Miles v. O'Hara, 1 Serg. & Raw. 32.

And where a note was made by a corporation payable to a person who was their agent, though the agency did not appear on the face of the note, and the note was endorsed by him with the word "agent" after his name, the Supreme Court of New York held that the endorser was not personally liable to a second endorser who had taken up the note, and who knew at the time the note was made that the first endorser was agent of the corporation. Savage C. J. dissented, considering the agent as personally responsible on his endorsement. Mott v. Hicks, 1 Cowen, 513.]

(47) Eaton v. Bell, Michaelmas, 1821. 5 B. and Ald. 34. Defendants were inclosure commissioners, and plaintiff the banker under the act: the act authorized the commissioners to raise money by rate, and directed that persons advancing money for the purposes of the act should be repaid with interest out of the moneys the commissioners should raise: defendants drew on plaintiff in this form: "Messrs. E.— Pay A. or bearer, 40*l.* on account of the public draining, and place the same to our account as commissioners of the Frodsham inclosure:" Plaintiff sued defendants personally; and Dallas C. J. left it to the jury whether credit was given by plaintiff to defendants personally, or to the fund they had to raise; the jury thought it given to defendants personally; and, on case, the Court thought them right, and plaintiff had judgment.

(48) Thomas v. Bishop, Str. 955. A bill for 200*l.* was drawn upon the defendant by the description of "Mr. H. Bishop, cashier of the York Buildings Company, at their house in Winchester street, London;" and the bill directed him to place the 200*l.* to the account of the company. The defendant accepted the bill; but, on being sued, insisted that the acceptance did not bind him personally, and gave in evidence that the letter of advice from the drawer of the bill was sent to the company. But Page J. directed the jury to find for the plaintiff, which they did; and upon a rule to show cause why there should not be a new trial, the whole Court held the direction right; that the addition to the defendant's name was only to describe him with more certainty, and to point out where he was to be found; that the direction to place the money to the account of the company was for the use of the

So, if an agent employed to buy bills get them payable to himself, and endorse them generally, he will be liable upon that endorsement even to his own employer (49): to have exempted himself he should have got the bills made payable to his employer, or should have introduced into his endorsement words to exclude his personal responsibility.

But, if a man employed to get a bill discounted be unable to effect it without endorsing it, though he bind himself to the endorsee, he will be entitled to be indemnified by his employer. (50)

Though his employer's name be not upon the bills. (50)

If a bill or note import to be drawn, accepted, or endorsed, by procuration, it will not bind the principal unless it be within the agent's power. (51)

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drawee only; and that the letter of advice could not vary the case against an endorsee (which the plaintiff was), because an endorsee could only look to the bill itself.

(49) Goupy v. Harden, Holt, 342. 2 Marsh. 404. 7 Taunt. 159. Plaintiff employed defendant at a commission of 10*s.* per cent. to procure him bills on Portugal, and to transmit them to him in Paris: defendant got bills payable to his own order, and endorsed them generally, without restriction; plaintiff afterwards sued him on this endorsement, and defendant insisted that, under the circumstances, this endorsement did not make him liable to plaintiff; but, on rule nisi to set aside verdict for plaintiff, the Court thought it did; for, had defendant meant to exclude his liability, he should have given a qualified endorsement: rule refused.

(50) Exparte Robinson, 1 Buck. 113. Nunn and Barber employed Watson and Co. to get bills of Nunn and Barber discounted. Nunn and Barber's names were not upon the bills, and Watson and Co. were obliged to endorse them: both houses became bankrupts, and demands having been made upon Watson and Co.'s endorsements, their assignees claimed against the estate of Nunn and Barber; and upon hearing, Lord Eldon thought Nunn and Barber's estate liable to relieve that of Watson and Co.: he allowed them to make a claim, directed that a dividend upon their claim should be reserved, and referred it to the commissioners to say for what sum they ought to prove, with liberty to state any special circumstances.

(51) Atwood v. Munnings, 7 B. & Cr. 278. Defendant gave his wife one power of attorney, authorizing her, amongst other things, for him and in his name and to his use, to endorse and negotiate bills. He afterwards gave her another power, to pay and accept bills drawn by his agent as occasion should require. Defendant was in a house of trade with several partners. Burleigh acted here as defendant's agent, and he acted also as agent for the house. He drew upon defendant for money owing by the house, and defendant's wife accepted the bill. Plaintiff discounted it, and on case, the question was, whether the wife's

Therefore, whoever takes a bill upon an endorsement by procuration should satisfy himself that the agent has power to endorse; he should look to his powers for that purpose. (52)

Otherwise, he may be unable to enforce payment; (52)

And may even be liable to refund if payment has been made to him, (52)

Or to any subsequent holder. (52)

But, a defect in the power of the agent will not subject an innocent holder to refund, if he has obtained payment; (52)

Especially if the person paying inspected the power before he paid, (52)

And the holder had no opportunity of so doing. (52)

[If a bill or note be signed by one person as the agent of another, the agency being stated on the instrument, the principal is bound if the person acting as agent had authority; but if he had no authority he is liable himself to the holder of the bill or note, in a special action on the case in England and Massachusetts, and in New York, as a party to the instrument. (*d*)

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acceptance was warranted by the powers. The three judges thought it was not; for, Burleigh did not draw this bill in the character of defendant's agent, and, the acceptance importing to be by procuration, plaintiffs should have satisfied themselves it was within the wife's authority. Postea to defendant.

(52) East India Company v. Tritton, 3 Bar. & Cr. 280. Three bills upon the East India Company were payable to Hope or order: they got into the possession of Card, who endorsed them "by procuration for Hope." Card had a power of attorney from Hope, but it was not sufficient to warrant these endorsements. From Card the bills passed to Davies and Card, and they endorsed them to defendants, their bankers: the Company required to see Hope's power to Card, and it was shown them, and they registered it in their books; the bills were afterwards presented for payment by defendants, the Company paid them, and Davies and Card drew the money from defendants. Hope's representatives afterwards enforced payment over again from the Company, on the ground that Card's endorsement was unauthorized: and the Company then sued defendants, on the ground that they were to be taken to have vouched for the validity of Card's endorsement. But on special verdict, the Court held, that defendants could not be taken to have given any such voucher; that they were at least equally innocent with plaintiffs, and then, it not being against conscience in them to retain the money, they were not liable to refund it; and, in truth, blame was rather imputable to plaintiffs, for plaintiffs saw the power, and had the opportunity of judging what it authorized, and defendants did not appear ever to have seen it. Judgment for defendants.

[(*d*) A bill was presented for acceptance at the house of the drawee,

And the agent cannot be bound as a party to the instrument, if the principal is bound by it (*e*), although the agent should misapply the money raised upon it to his own private use. (*f*)

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who was absent. A., who resided in the same house, being assured by one of the drawers that the bill was regularly drawn, and supposing that the drawee would have accepted it had he been at home, accepted it as by procuration of the drawee. The drawee refused to honor the bill. The bill was subsequently transferred by several endorsements. Held, that A. was liable to be holden, not as acceptor, but on a case stating the facts specially. Polhill v. Walter, 3 B. & Adol. 114.

Colburn was sued as maker of a note signed by him "pro Wm. Gill, J. S. Colburn." The Court held that the action would not lie; but that Gill was liable as maker of the note if Colburn had authority to sign it in his name; and that if Colburn had no authority, he was liable to a special action on the case. Long v. Colburn, 11 Mass. R. 97.

In an action against Talbot as maker of a note which he had signed, writing after his name "agent for David Perry," where it was proved that he had no authority to act as Perry's agent, it was held that the action in this form was not maintainable; but that a special action on the case would be the proper remedy. Ballou v. Talbot, 16 Mass. R. 461.

But in a similar case in New York, the Court held that the person falsely representing himself as agent, was liable to an action as maker of the note. The Court said, "If a person under pretence of authority from another executes a note in his name, he is bound, and the name of the person for whom he assumed to act will be rejected as surplusage. The party who accepts such a note under such mistake or imposition, ought to have the same remedy against the attorney who imposes on him, as he would have had against the pretended principal, if he had been really bound." Dusenbury v. Ellis, 3 Johns. Cas. 70.

Rossiter v. Rossiter, 8 Wend. 494. In this case the defendant was held personally liable on a note signed by him as attorney for another, on account of want of authority. No objection appears to have been made to the form of action, which was assumpsit.]

[(*e*) Chandler was sued as maker of several notes, in the following form: "I, the subscriber, treasurer of the Dorchester Turnpike Corporation, promise," &c. and signed "Gardner L. Chandler, Treasurer of the Dorchester Turnpike Corporation." These notes were given for a debt of the Corporation, and Chandler was duly authorized to make them. By the Court. "The Corporation is itself liable. The consideration moved wholly from them. It is very apparent that the plaintiff did not at the time of receiving the notes look to the defendant's personal security. The whole transaction was on behalf of the Corporation. Their property is liable; the defendant is not." Mann v. Chandler, 9 Mass. R. 335.

See also Mott v. Hicks, 1 Cowen, 513.]

[(*f*) Darling was sued as acceptor of a bill and on the money counts. The bill was drawn on Darling, "agent of the Commission Company," and accepted thus, "Accepted, Noyes Darling, Agent C. C." Darling had authority to accept bills as agent of the Commission Com-

If a bill be signed "A. B. *agent*," the name of the principal nowhere appearing upon it, A. B. is liable as drawer of the bill, and not the principal, although A. B. had authority to draw bills in his principal's name. (*g*)

A power of attorney to collect debts, to execute deeds of lands, and to accomplish a complete adjustment of all the concerns of the constituent in a particular State, and "to do any and every act in his name which he could do in person," does not authorize the attorney to sign notes in the name of his principal, the generality of the last words being limited by the expressed objects of the power. (*h*)

It is held that a minor under guardianship, having a general authority from his guardian to contract, cannot bind the guardian by a note. (*i*)

A subsequent ratification of a note given in the name of one person by another, as his attorney, has been held not to exonerate the person acting as attorney from his personal liability on the note, he having had no sufficient authority when he signed the note. (*k*)

Where the principal authorizes his agent to draw bills for him, and the agent draws a bill signed with his own name, but on the face of the bill directing the drawee to charge it to ac-

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pany. The plaintiffs advanced money to Darling upon this bill; but the bill was drawn and accepted for, and the money appropriated to, Darling's private use, without the knowledge or consent of the Company. The Court of Errors of Connecticut held that Darling was not liable to the action. Swift C. J. "Whether a party to an instrument made by an agent in the name of his principal, so as to bind him, but actually made for the benefit of the agent, may, in certain cases, waive his claim on the principal, and bring his action against the agent, as upon his personal contract, is a question not now necessary to decide. The plaintiffs now hold a bill of exchange uncancelled, against the Commission Company of sufficient ability to pay it, accepted by the defendant as their agent so as to be obligatory upon them, and to whom he is accountable for the money received. The express written contract extinguishes the implied one. The plaintiffs then cannot recover on either of the in debitatus counts; nor on the count for the bill of exchange, for that was never accepted by the defendant in his private capacity, but as agent for the Commission Company, so as to be binding on them." Gould J. dissented. Shelton v. Darling, 2 Conn. R. 435.]

[(*g*) Pentz v. Stanton, 10 Wend. 271.]
[(*h*) Rossiter v. Rossiter, 8 Wend. 494.]
[(*i*) Rossiter v. Marsh, 4 Conn. R. 196.]
[(*k*) Rossiter v. Rossiter, 8 Wend. 494.]

count of his principal, the principal is liable to the holder of the bill, in equity, if not at law. (*l*)

If in such case the agent has no original authority to draw, but the transaction be subsequently ratified by the principal, the latter will be liable as drawer. (*l*)

Where the master of a ship, by authority of the owners, draws a bill in his own name, but expressed to be on their account, to pay for cargo supplied for them, the owners are

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[(*l*) Clark and the firm of Monroe, Snow & Monroe, were joint owners of the ship Patterson. The ship was sent by the owners on a voyage to Batavia, and B. Monroe, of the house of Monroe, Snow & Monroe, sailed in her as supercargo. He had authority from the owners, if he thought it best or necessary to complete the lading of the ship at Batavia, to draw bills on their joint account upon Crommelin & Sons, at Amsterdam. B. Monroe at Batavia took up money on joint account of the owners and invested it in a return cargo, and for the amount drew a bill on Crommelin & Sons in favor of Van Reimsdyk, concluding, "charge the same with or without further advice to account of John Innes Clarke, Esq. and Messrs. Monroe, Snow & Monroe, merchants, Providence, Rhode Island, North America. Your ob't. serv't. Benjamin Monroe." The bill was dishonored, of which the ship owners had due notice, and Monroe, Snow & Monroe became insolvent and were discharged under the insolvent laws of Rhode Island; and Van Reimsdyk brought a bill in equity in the Circuit Court against Clarke's executors. Story J. said that it was objected that the bill being drawn in the separate name of B. Monroe, no remedy lay against the ship owners. "In equity I find no difficulty in reaching all the parties who were beneficially interested. I do not mean to decide that even at law this bill would be deemed the separate draft of B. Monroe. Perhaps under all the circumstances, it might be questionable, if on the face of the instrument, it might not be susceptible of being construed a partnership draft. But even admitting it to be the separate draft of B. Monroe, the authority confided to him must be deemed to have entitled him to draw in his own name on the joint funds, and to have guarantied to the holder an acceptance and payment by the drawee." He said that it was objected, supposing the bill to be the separate bill of B. Monroe, that the agreement to pay by the joint owners being a parol agreement, was within the statute of frauds. But he said there was no foundation for the suggestion, even if the statute could apply to a contract made in a foreign country, because it was a promise to pay their own debt, not that of a third person. Judgment was given for the plaintiff for the full amount of the bill, damages, and interest. Van Reimsdyk v. Kane, 1 Gallis. 630. As to what is a sufficient authority to an agent to authorize him to sign a note, or draw or accept a bill, in the name of the principal, see Chomqua v. Mason, 1 Gallis. 342. Emerson v. Prov. Hat Manuf. Co. 12 Mass. R. 237; and Munn v. Commission Company, 15 Johns. R. 44. It seems that a general agent has such authority; but not a sub-agent appointed by the general agent. Emerson v. Prov. Hat Manuf. Co. 12 Mass. R. 237. Munn v. Commission Company, 15 Johns. R. 44.]

liable as parties to the bill, and are discharged by any laches in the holder in presenting the bill or giving them notice of its dishonor in the same manner as if it was drawn in their name. (*m*)

If the name of the maker of a note, at his request, be signed by the payee, it is as binding as if signed by any other agent of the maker. (*n*)

If a person signs a note "as guardian," he is personally liable on the note. (*o*)

Or if he sign after his name, "*Trustee of A. B.*" (*p*)

So a note by which A. B. as "president of the M. F. Insurance Company," (a corporation) promises to pay a certain sum, is the note of A. B., not of the Company. (*q*)

If a note be payable to A. B. as trustee of a corporation, A. B. and not the corporation is the legal proprietor of the note, and he is the party to bring a suit upon it. (*r*)]

Sect. 8.—If a man draw a bill or note as executor of J. S., and sign it in terms as such, yet if it be in a form which implies assets, or will procure forbearance, it will bind him personally. (53)

[(*m*) Wallace v. Agry, 4 Mason, 336.]

[(*n*) Haven v. Hobbs, 1 Verm. R. 239.]

[(*o*) The defendant made two notes, promising "as guardian to A. L., an insane person." The Court held that he was personally liable on the notes, after he had ceased to be guardian; and said that he could not make his ward liable on the contract, nor his ward's assets, and that his description of himself, in the notes, could not vary the form of action. Thacher v. Dinsmore, 5 Mass. R. 299.

Fuller, who was guardian of Scott, made a note promising, as guardian of Scott, and signed "Timothy Fuller, guardian." It was held that Fuller was personally liable on the note. Foster v. Fuller, 6 Mass. R. 58.]

[(*p*) Hills v. Bannister, 8 Cowen, 31.]

[(*q*) Barker v. Mechanic Fire Insurance Company, 3 Wend. 94.]

[(*r*) Binney v. Plumley, 5 Verm. R. 500.]

(53) Childs v. Monins and Bowles, 2 Brod. and Bingh. 460. Defendants signed this note, "As executors to J. S. we severally and jointly promise to pay plaintiff 200*l.* on demand, together with interest:" they were sued thereon, and then contended that it only bound them as executors; but on demurrer, the Court were clear it bound them personally: it admitted assets, and tended to procure forbearance, and as a several note from each, would bind the executor of whoever

If an executor mean, to limit his responsibility, he should confine his stipulation, viz. to pay out of the estate; and if an executor endorse, it binds him personally. (54)

Sect. 9.—It is no objection to a bill or note, that it is payable or endorsed to a person who at the time it was given was an alien enemy, if it were given to him in his own country by a British subject who was then a prisoner there. (55)

And it is no objection to an action on such a bill, that it is brought as to part in trust for an alien enemy. (56)

So, it is no objection to an action on such a bill that it was given whilst an act of parliament was in force which made it penal to pay such bills, if after the act expired there were a promise to pay it. (57)

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died first, and ultimately the executors of both; an effect it would not have if it bound them as executors only.

(54) King v. Thom, 1 Term Rep. 487. The Court held, that upon a bill payable to several as executors, they might sue as executors: and, per Buller J., "if they endorse, they are liable personally, and not as executors; for, their endorsement would not give an action against the effects of the testator."

(55) Antoine v. Morshead, 6 Taunt. 237. Sir John Morshead, Tyndall, and Estwick, were prisoners of war at Verdun in France. Sir John Morshead drew bills on defendant, some payable to Tyndall, and some to Estwick; they endorsed them to plaintiff, a banker at Verdun. Defendant accepted them; but on being sued thereon at the return of peace, he insisted that the endorsement, as being during the war, was void: Gibbs C. J. thought otherwise; and on motion for a new trial, the whole Court agreed with him, and the plaintiff recovered.

(56) Daubuz v. Morshead, bart. 6 Taunt. 332. Endorsee against acceptor on bills drawn by an English prisoner in France in favor of Borau Basti, and endorsed to plaintiff; defence, that plaintiff was only a trustee, except as to a small part, for an alien enemy; but Gibbs C. J. thought plaintiff entitled to a verdict for the whole; and verdict accordingly.

(57) Duhammel v. Pickering, 2 Stark. 90. Defendant was a prisoner of war in France in 1795, and drew four bills on Wishaw in England, payable to La Tailleur, an alien enemy residing in France: by 34 Geo. 3. c. 9. s. 4. if any person paid any bill drawn in France during the war, he was liable to forfeit double value, and the payment was annulled. On the peace in 1802, defendant wrote to La Tailleur's agent, promising payment: this action was brought by La Tailleur's administrator. It was insisted that the statute was a bar to plaintiff's claim; and Lord Ellenborough said, no doubt the bills were void in their creation as bills to be enforced in this country, but they might constitute the basis of a promise on the return of peace; and he thought the promise in defendant's letter removed all doubt on the subject; and plaintiff had a verdict for principal and interest.

CHAP. *A.*

Doctrine of the LEX LOCI, *or by the Laws of what place the Liabilities of the Parties to a Bill or Note is regulated.*

IT is a general rule that "the law of the place where a contract is made, is to govern, as to the nature, validity, and construction of such contract. This doctrine has become incorporated into the code of national law in all civilized countries." (*a*) But this rule supposes that the contract is to be executed where it is made. "*The law of the place,*" says Lord Mansfield, "can never be the rule where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed." (*b*) A bill of exchange is made in one place, payable in another, and often endorsed at divers others; and the question arises how far the rights, obligations, and liabilities of the several parties to the bill, are determined by the distinct laws of these places. According to the expression of Lord Mansfield, the rights and obligations of the parties will be governed by the laws of the place to which they had reference in their contract. The validity, and to some purposes the construction, of the contract of the drawer (*c*), and of each endorser, will be governed by the laws of the place of drawing or endorsing the bill; but as each of these in effect undertakes that another person, namely, the drawee, shall accept and pay the bill on its being duly presented for these purposes; reference is necessarily

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(*a*) Per Story J. Van Reimsdyk v. Kane & al. 1 Gallis. 375, who cites Hub. de Conflictu Legum, tom. 2. l. 1. t. 3. Emerigon des Assur. tom. 1. c. 4. s. 8. Dig. L. 6. de evictionibus; Casar. Disc. 179, s. 57. Disc. 43. s. 19; Disc. 130. s. 28, 33. 34; Decis. Rot. Genuæ 38; Straccha, 147. See also Robinson v. Bland. Burr. 1077. Wm. Bl. 256; Smith v. Smith, 2 Johns. 282, and 8 Johns. 146.

Story's Conflict of Laws, s. 314. 317. 322. 335, and 343 to 347. Day's ed. of Comyns' Dig. art. Agreement n. The cases on this subject are collected, 4 Cowen's R. 513. p. An assignment made in Louisiana is construed in another State, according to the laws of Louisiana. Mackie v. Cairns, 5 Cowen's R. 578.

(*b*) Robinson v. Bland, Burr. 1077.

(*c*) Humphreys v. Collier, 1 Breese, 231.

had to the laws of the place on which the bill is drawn, to determine what must be done by the holder of the bill, and what will be a fulfilment, on the part of the drawee, of the undertaking of the drawer and endorsers in respect to the acts to be done by him. If the drawee fail to do what the drawer and endorsers have undertaken he shall do, then reference will again be had to the laws of the places of drawing and endorsing the bill, to determine what notice the holder must give of its dishonor, and what damages the drawer or endorsers must pay. Where the contract appears upon the face of it to be made in reference to the laws of divers places, it will be affected accordingly by those laws respectively; but where a contract has reference to no other place, it will be governed by the laws of the place where it is made.

A bill or note which is void in the State or country where it is made for illegality in the consideration, cannot be the ground of action in another State or country between the parties to the illegal consideration. (*d*)

But a note made in one State, payable in another State, at a rate of interest legal in the latter State, but illegal in the former, is valid. (*e*)

If a party is discharged from his liability on a bill or note, by the law of the place where he became party to it, it will be a discharge to him every where. (*f*)

(*d*) Touro v. Cassin, 1 Nott & M'Cord, 174; Van Schaick v. Edwards, 2 Johns. Cas. 155.

A bill was drawn in France by Bland on himself in England, in favor of Robinson, partly for money lent, and partly for money won at play. Lord Mansfield said, "the parties had a view to the English law;" and the Court held the bill to be void under the English statute against gambling. It was said however that the debt for which the bill was given could not have been legally enforced in France, though it was valid in the court of honor there. Robinson v. Bland. Burr. 1077. Wm. Bl. 256. And this seems to be a material circumstance, for the legality of the consideration is more properly determined by the laws of the place where the consideration passed, and the contract was made, than by those of the place where it is to be executed.

(*e*) A note made in Massachusetts at the New York rate of interest, which was usurious in Massachusetts, for the price of land in New York where the holder resided, and where it was payable, was held to be valid. Van Schaick v. Edward, 2 Johns. Cas. 355.

(*f*) The maker and payee of a note were both citizens and inhabitants of Rhode Island, and the maker obtained a discharge under the

But whatever amounts to a discharge of a party to a note, under the judgment of a Court having jurisdiction of the party, will be valid elsewhere. (*g*)

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insolvent laws of that State; it was held that this discharge was a bar to an action by a citizen of Massachusetts, to whom the note was subsequently endorsed. Baker v. Wheaton, 5 Mass. R. 509.

A bill was drawn at New Orleans on a house in Philadelphia, of which the drawer was a partner; and was protested at Philadelphia for non-acceptance and non-payment, of which due notice was given to the drawer in New Orleans; who was subsequently discharged under the insolvent laws of Louisiana. The Court said "the drawer became conditionally liable for the payment, and the condition was the receiving due notice of the dishonor of the bill, and this notice was given in New Orleans. The circumstance of the bill's being drawn upon a person in another State can make no difference. The whole contract and responsibility of the drawer was entered into and incurred in New Orleans. And it was accordingly held that his discharge in New Orleans exonerated him. Hicks v. Brown, 12 Johns. R. 142.

A discharge under the insolvent laws of a State may be invalid as to some parties, on account of its infringing the clause of the United States constitution, which prohibits the States from passing laws impairing the obligation of contracts. But this does not affect the general position taken in the text, because the constitution of the United States is law in every State, and as such operates on contracts made in each State.

A note made in Rhode Island was endorsed in New York by Van Arsdaln, a resident in Pennsylvania, to Van Raugh. Van Arsdaln was discharged of his debts under the insolvent laws of Pennsylvania after a suit had been commenced against him in New York, Van Raugh, the holder of the note, not being included in the list of creditors, nor the note mentioned among Van Arsdaln's debts in the proceedings under the insolvent laws of Pennsylvania. Mr. Chief Justice Kent said, "We are of opinion that the discharge is no bar. A discharge under the insolvent laws of another State, will not take away the right of a citizen of this State to sue here upon a contract made here." Van Raugh v. Arsdaln, 3 Cain. R. 154.

A bill was drawn at Demarara on Clapham of Boston (Mass.) payable to Powers. Lynch, a native citizen of the United States resident at Demarara, by his endorsement guarantied its payment. The bill was returned to Demarara protested for non-payment, and payment was demanded of the drawer in that place. By the law of Demarara any person holding a bill protested for non-payment, and demanding payment thereof from the drawer, thereby loses all remedy against an endorser. Lynch coming to Boston, was sued by Powers upon his endorsement. The Court held that the defendant, being discharged by the law of the place where the contract was made, was not liable to an action in the United States. Powers v. Lynch, 3 Mass. R. 77.

But see an anonymous case, 2 Hayw. N. C. R. 280.

(*g*) Hull v. Blake, 13 Mass. R. 153.

The maker of a note made and still held in Massachusetts was held liable to a creditor of the payee, in a process of foreign attachment in Georgia, and judgment was rendered against the maker for the amount of the note under such process. In an action in Massachusetts against

The ability of a party to a bill or note to bind himself must be decided by the law of the place where he enters into the contract. (*h*)

The liability of the acceptor of a bill or of the maker of a

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the maker of the note by a person to whom it had been endorsed before the commencement of the suit in Georgia, held that the judgment in Georgia was a bar to the action.

But in a subsequent case it was held, that such a judgment was not a bar to the action of the endorsee until the maker paid the money upon it, as the judgment might be otherwise satisfied. Merriam v. Rundlett, S. J. C. Suffolk, Mass. March T. 1833, not yet reported.

The same regard does not appear to be paid in England to a foreign judgment. Rossi, the defendant, for a good consideration, endorsed bills to Novelli, the plaintiff, which had been drawn and endorsed to the defendant by parties in France, but were accepted and payable in England. The plaintiff endorsed them over. On being presented for payment, the banker's clerk inadvertently cancelled the acceptances, but immediately wrote opposite to them, "*cancelled by mistake.*" The bills were not paid. The holders then presented them to a firm to whom they were addressed in case of need, but they refused payment, on account of the cancelling, though they would otherwise have paid them. A re-acceptance was obtained from the acceptor, but he did not pay the bills. The plaintiff then took them up and returned them to the defendant, who applied to the prior endorsers for payment, but they refused. The defendant who resided abroad, cited the drawers, the intermediate endorsers, and the plaintiff before the Tribunal of Commerce at Lyons, for the purpose of obtaining a guaranty for himself against liability on the bills. The Court adjudged him and the other parties, except the plaintiff, discharged from liability, and that the bills should remain to the plaintiff's debit. The plaintiff then carried the cause before the Cour Royale at Lyons, which confirmed the decree, assigning as a reason that the cancelling of the acceptances operated as a suspension of legal remedies against the acceptor, and was equivalent to a delay granted to him by the holders, with whom the plaintiff was identified, and consequently that the other parties to the bills were discharged. *Held*, that the defendant was still liable to the plaintiff for the debt on account of which the bills were passed to him, notwithstanding the decree of the French Court, which the Court of King's Bench held had mistaken the English law as to the effect of the cancellation. Novelli v. Rossi, 2 B. & Ad. 757.

(*h*) The maker of a promissory note made in Jamaica, and payable in New York, was under twenty-one years old. It was taken for granted by the Court that the note would have been void if made in New York, but as it was not proved that the age of infancy or minority was the same in Jamaica as in New York, the maker was held to be liable; for the Court said it did not appear that the maker was not of age to bind himself by his contracts, according to the laws of Jamaica, at the time of making the note. Thompson v. Ketcham, 8 Johns. R. 146.

note, depends on the law of the place where the bill or note is payable. (*i*)

Thus the interest which the acceptor of a bill or maker of a note is liable to pay, depends upon the law of the place where it is payable. (*k*)

(*i*) See Scofield v. Day, Foden v. Sharp, Boyce v. Edwards, infra, and Schaick v. Edwards, supra.

A note made in Virginia and payable in New York, was held to be governed by the laws of New York. The note was in the usual form, except that it said, "Witness my hand and seal," and the maker's name had after it the letters L. S. with a flourish. The endorsee brought *assumpsit* upon the note against the maker in New York. Kent C. J. delivered the opinion of the Court. "The note was given in Virginia, and by the laws of that State it was a sealed instrument or deed. But it was made payable in New York, and according to a well settled rule, it is to be tested and governed by the law of this State. We have never adopted the usage prevailing in Virginia and some other States, of substituting a scrawl for a seal. A scrawl with a pen is not a seal." Warren v. Lynch, 5 Johns. R. 538.

The position in the text is contradicted in the following case.

A bill payable in London was accepted at Manchester, England, by a partner of a house established at Boston, Massachusetts, in the partnership name. The partner who thus accepted for the firm was domiciled in Boston. The bill being dishonored a suit was commenced in Massachusetts against the acceptors. On a question respecting the rate of damages to be recovered, Parsons C. J. giving the opinion of the Court, said, "It is manifest that the remedy contemplated by the parties, in the event of the bill being dishonored, must be sought in this State, where the acceptors lived. The instrument must be considered as a foreign bill, having the same effect as if the payee had sent it to Boston, and it had been accepted here payable in London." And 10 per cent. was recovered for re-exchange, according to the Boston rule, in case of a bill drawn here on a foreign country and returned. Grimshaw v. Bender, 6 Mass. R. 157.

The decision in this case does not seem satisfactory. The contract of the acceptors of the bill was to pay money in London. For a breach of this contract they were liable according to the law of England. The contract of the drawer and endorsers is very different from that of an acceptor. They do not contract to pay the money at the place where the bill is payable, but engage, in case the bill is dishonored and they are duly notified, they will make the holder good.

Story, in his Conflict of Laws, s. 319, considers it difficult to reconcile this case with established principles.

Where a note was made in Mississippi and endorsed in Louisiana, it was held, in an action brought in Louisiana against the maker, that the defendant was bound only by the laws of Mississippi, and might set up the same defence against the endorsee which he could against the payee. Ory v. Winter, 16 Martin, 276; and see Ferguson v. Howell, 16 Martin's R. 312.

(*k*) It was held in New York, in a case on a promissory note made in Canada, payable in England, that English interest only could be

The damages which the drawer of a bill is liable to pay in case of its dishonor, are determined by the law of the place where it is drawn, not that of the place where it is payable, or where the suit is brought. (*l*)

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recovered on the note, not the New York rate of interest. Scofield v. Day. 20 Johns. R. 102.

A member of a New York house accepted a bill in the partnership name at Manchester, in England, payable in London. The bill being dishonored a suit was commenced upon it in New York against the acceptors, and the question arose whether the plaintiffs were entitled to recover interest at the New York rate of 7 per cent. or the English rate of 5 per cent. By the Court, "The bill having been drawn in England, and made payable there, the plaintiffs were entitled to 5 per cent. interest only." Foden v. Sharp, 4 Johns. R. 183.

Where a bill drawn in Georgia upon a person residing in South Carolina, and payable in South Carolina, is accepted, the acceptor is liable to pay interest according to the law of South Carolina. Boyce v. Edwards, 4 Pet. Sup. C. R. 111; Braynard v. Marshall, 8 Pick. R. 194; Burrow v. Jemino, 2 Str. 733.

"Where a general order is given to draw bills from a certain place on account of advances there made, the undertaking is to replace the money at that place." Therefore, where Barker of New York had authorized Lanusse to draw bills upon him from New Orleans, which he refused to accept after they were drawn, the Court held that Lanusse might recover from Barker the legal interest at New Orleans, 10 per cent. from the time the bills were protested. Lanusse v. Barker, 3 Wheat. R. 146.

(*l*) By the statute of South Carolina, March 22, 1786, on "all bills drawn upon persons resident within the United States, and out of that State, and which shall be *returned* protested, the damages shall be 10 per cent." A bill being so drawn and returned, and a suit afterwards commenced upon it against the drawer, in Pennsylvania, the Court adopted the rule of the South Carolina statute in fixing the rate of damages. Hazlehurst v. Kean, 4 Yeates, 19.

A different decision was given upon a very similar case in South Carolina, upon a bill drawn upon Charleston, at Nassau, where the damages upon bills returned protested are 12 1-2 per cent. The bill was accepted at Charleston, but not paid. As the drawer was in Charleston at the time of the dishonor of the bill, there was no occasion to return it to Nassau to give notice of the non-payment. In suits in South Carolina against the drawer and acceptor, the Court was of opinion that the holder was not entitled to the damages of 12 1-2 per cent., according to the Nassau rule. Bain v. Ackworth, 1 South Car. R. 107.

But in a previous case in South Carolina, a different rule seems to have been acted upon. In an action on a bill of exchange drawn in Boston, (Mass.) upon persons in S. Carolina, it was left by the Court to a special jury of merchants to decide what damages the defendants (probably endorsers—the case does not say) were liable to pay; and whether the damages were to be regulated by the laws and customs of Massachusetts or of South Carolina with regard to bills returned pro-

But where there was an agreement made by the drawer of a bill drawn in one country with the payee that it should be negotiated in another country, the drawer was held liable to the payee, who had endorsed it and sold it in the latter country, for the damages which the latter had to pay on the dishonor of the bill. (*m*)

What is a sufficient notice of the dishonor of a bill to the drawer, must be decided by the law of the country where it is drawn. (*n*)

The endorsement of a bill or note, being a new contract of the endorser, his liability is regulated by the laws of the place where the endorsement is made. (*o*)

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tested. The jury gave interest and 3 per cent. damages, agreeably to the custom of merchants in Boston on inland bills protested. Winthrop v. Pepoon, 1 Bay, 468.

The Court of South Carolina however in another case acted upon the rule laid down in Bain v. Ackworth. Cruger in St. Croix drew a bill on himself payable in Charleston, and accepted it himself. After his return to Charleston, the bill was presented to him for payment, and protested for non-payment. A question was made as to interest and damages. The jury who tried the case allowed 12 per cent. interest, the legal interest of St. Croix; and 10 per cent. the South Carolina damages on inland bills. The judges were of opinion that as the contract was to be performed in South Carolina, the damages must be governed by the laws of that State; and that as no law in South Carolina regulated the damages where a man draws upon himself, no damages could be recovered; and with regard to interest, only 7 per cent. interest, the legal rate of South Carolina, from the time of the demand. New trial. M'Candlish v. Cruger, 2 Bay, 377.

See also Astor v. Benn, post.

(*m*) A bill being drawn in Canada on Liverpool, with an agreement that it should be negotiated through New York, the drawer was held to be liable to indemnify the endorser in New York, against the damages paid by him on the dishonor of the bill, though higher than the Canada rate. Ferguson v. M'Donald, 1 Stuart's L. Can. R. 70. n. But in the absence of any such agreement he was held liable only according to the Canada rate. Astor v. Benn and others, 1 Stuart's L. Can. R. 69.

(*n*) Wallace v. Agry, 4 Mason, 336.

(*o*) A case came before the Supreme Court of the United States upon a bill drawn in Barbadoes upon England, and endorsed by Slacum at Alexandria, in the district of Columbia; and the question was whether the 15 per cent. damages on dishonored bills allowed by the laws at Alexandria should be allowed in this case. Mr. Chief Justice Marshall, giving the opinion of the Court, said, "Although the drawer of the bill was not liable to the damages of Virginia, the endorser is subject to them, he having endorsed the bill in Alexandria. The en-

Whether a bill is a satisfaction of a simple contract debt, on account of which it is given, must be decided by the law of the place where the bill is drawn, not that of the drawer's residence, if he reside in a different country. (*p*)

In one respect a contract may be affected by the laws of a place other than that where it is made, or those to which it has reference, namely, in respect to the remedy, or the means and manner of enforcing it against the contractors.

What shall be the form of action, and who shall be parties to it, depend on the law of the place where the suit is brought. (*q*)

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dorsement is not simply the transfer of the paper, but a new and substantive contract." Slacum v. Pomeroy, 6 Cranch, 221.

But in an action in N. Carolina upon a bill drawn in the West Indies, and endorsed in New York, the Court said, "The question is whether the damages on a protested bill shall be regulated by the laws of the country where it is endorsed, in an action against the endorser. When a bill is endorsed, the endorser places himself in the situation of the original drawer, and subjects himself to the same duties which he was bound to perform. All that can be understood by an endorsement being in the nature of a new bill, is, that the endorser places himself in the situation of the drawer, and must be answerable to the endorsee in the same manner as the drawer must ultimately be answerable to him. Schermerhorn v. Pelham, Cam. & Nor. 452.

A bill was endorsed in blank in France, where such an endorsement is not a transfer, but only a procuration, authorizing a person to demand and prosecute in the name of the endorser. Held, that the endorsee could not sue in his own name in England. Trimbey v. Vignier, 6 Car. & P. 695. 4 Moore & Scott, 695.

(*p*) Wallace v. Agry, 4 Mason, 336.

(*q*) An action was brought in New York by an endorsee against the maker of a promissory note dated at Suffield, in Connecticut. By the laws of that State notes were not then negotiable, so as to enable an assignee to sue in his own name, but remained on the footing of choses in action at common law. It was held that the suit was maintainable, whether the contract was to be governed by the law of Connecticut or not. "The admission of the *lex loci* can have reference only to the nature and construction of the contract and its legal effect, and not to the mode of enforcing it." Lodge v. Phelps, 1 Johns. Cas. 139; 2 Cain. Er. 321.

And see Com. Dig. Day's ed. art. Agreement, n. Pearsall v. White, 2 Mass. R. 84; Dwight v. Clark, 7 id. 515; Vermont Bank v. Porter, 5 Day's R. 320.

A paper with a scrawl for a seal being a deed where made, will not support covenant where a scrawl is not a seal. Andrews v. Herriot, 4 Cowen's R. 508. n. Warren v. Lynch, 5 Johns. R. 538.

CHAP. III.

Sect. 1. *Of the Stamp upon a Bill or Note, and consequence of neglect to have Stamp thereon.*
2. *Of the Stamp on Notes made out of Great Britain.*
3. ——— *on Bills sketched out in Great Britain, and signed abroad.*
4. ——— *on Bills signed out of Great Britain, but filled up here.*
5. *Of Bills or Notes dated abroad but made here.*
6. *Excepted Bills and Notes.*
7. *Frauds as to Draughts on Bankers, penalty.*
8. *Amount of Duty.*
9. ——— *not to be computed on interest.*
10. *What Bills or Notes are to be considered as exceeding sixty days after sight, or two months after date.*
11. *Consequence of dating forward to evade this duty.*
12. *Species of Stamp—right denomination.*
13. *Time of Stamping.*
14. *On re-issuable Notes—and what Notes re-issuable.*

The paper, parchment, vellum, or other matter, whereon a bill or note made in Great Britain is written, must, except in a few instances, be stamped (1) before the bill or note is written; otherwise, the (2) party making, signing, or issuing it, or causing it to be made, signed, or issued, or accepting or paying it, or causing or permitting it to be accepted or paid, will be liable to a penalty of 50*l.*, and the bill or note will (3) not be available in law or equity. It will not be available even in the hands of an innocent holder, who gave full value for it. (4)

And no laches by the holder will make such unstamped bill

(1) 55 Geo. 3. c. 184; 31 Geo. 3. c. 25. s. 19; 34 Geo. c. 32.
(2) By 55 Geo. 3. c. 184. s. 11.
(3) See 31 Geo. 3. c. 25. s. 19; 55 Geo. 3. c. 184. s. 8.
(4) **Ex parte Manners, post.**

or note amount to payment of a prior debt (5); even though the bill, but for such laches, would have been paid. (5)

But an unstamped bill or note may be looked at for a collateral purpose; as to judge whether the party signing it was drunk or sober at the time. (6)

And the forging a bill or note on unstamped paper, or uttering such bill or note with knowledge of its being forged, and with an intent to defraud, is as much an offence as if the bill or note were on paper duly stamped. (7)

Sect. 2.—A note payable to the bearer on demand, made, or purporting to be made, out of Great Britain, or purporting to be made by or on the behalf of any person resident out of Great Britain, (except where made and payable in Ireland only,) (8) cannot be negotiated, circulated, or offered or taken in payment, or offered for payment or paid here, unless it be stamped in like manner as a note of the same tenor and value made in Great Britain, under a penalty upon the party offending therein of 20*l.*

Before this provision, a note made in (9) any part of the King's foreign dominions, (as Jamaica) where by law a stamp was necessary, could not have been received in evidence here, unless, it had such stamp as the law of that country was proved to require.

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(5) Wilson v. Vysar, 4 Taunt. 228.
(6) Gregory v. Frazer, 3 Camph. 454.
(7) Rex v. Hawkeswood, Pasch. 1783.
See Rex v. Teague, Mich. 1802. post.
(8) By 55 Geo. 3. c. 184. s. 29.
(9) Alves v. Hodgson, 7 Term Rep. 241. A note was produced in evidence, which had been made in Jamaica: the defendant objected that it ought to have been stamped, and proved the law of Jamaica, requiring a stamp. Lord Kenyon thought the objection good, but suffered the plaintiff to take a verdict, with liberty to the defendant to move to enter a nonsuit. In showing cause against a rule nisi obtained for such purpose, it was urged that the defendant could not avail himself of an objection founded on a revenue law of a foreign country; but Lord Kenyon said, "I think we must resort to the laws of the country in which the note was made, and unless it be good there, it is not obligatory in a court of law here. But as the plaintiff might have recovered, without this note, on the quantum meruit, let there be a new trial."

Sect. 3.—A bill drawn in Ireland with blanks for sum, date, and drawee's name, and transmitted to England to have the blanks filled up, though it may require an Irish stamp, will not require an English one. (10)

Sect. 4.—If a bill upon which a person residing abroad is intended to be drawer, be sketched out and accepted here, and then transmitted to such person abroad that he may sign his name as drawer, this is to be considered a foreign bill, and does not require an English stamp. (11)

And the acceptor is liable upon it though it be unstamped. (11)

Sect. 5.—If upon a bill dated abroad the defence be that it was made in England, and has not an English stamp, that defence ought to be made out by distinct evidence; because such conduct to evade the stamp duties would be a very serious offence. (12)

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(10) Snaith v. Mingay, 1 Maule and Sel. 87. Bayley and Co. of Waterford, in Ireland, had one partner, Wallace, resident in England, where he carried on a separate trade, and he was restrained by the articles of partnership from drawing bills in the partnership name; they sent him over four signatures made by them as drawers and endorsers on copperplate impressions, with blanks for dates, sums, and drawees' names; they were to be used by him in his separate trade, and he filled them up and used them accordingly. They were on Irish stamps only; and in an action upon them against the second endorser, it was objected that they ought to have had English stamps; but on a case reserved, the Court thought otherwise; because, they were bonâ fide *signed* in Ireland, and therefore were to be considered as *made* there.

(11) Boehm v. Campbell, Gow. 56. 8 Taunt. 679. In an action by drawer against the guarantee of an acceptor, it appeared that the plaintiff lived at Antwerp; that the whole of the bill, except plaintiff's signature, was written here; that the bill was accepted before plaintiff signed it; that it was then transmitted to plaintiff for his signature, and that he signed it at Antwerp. It had no stamp, and it was urged that it was to be considered as made here and should have had a British stamp; but Dallas C. J. thought it was to be considered as made where it was drawn, and that it was not to be considered as drawn till the plaintiff signed it; and plaintiff had a verdict.

(12) Abraham v. Dubois, 4 Campb. 269. Action on bill dated Paris, 1st March; defence, that it was drawn in London, and proof that the drawer was in London 3d March, at eleven in the forenoon. Per Lord Ellenborough: "It is not very probable this bill was drawn in

Proof that the drawer was in London so near the date of the bill, that it could not have been drawn on the day of the date at the place from which it is dated, is not sufficient. (12)

But, if the fact of its being made in England be satisfactorily proved, it will prevent even a bonâ fide holder for valuable consideration from recovering upon it. (13)

Paris 1st March; but if it were proved ever so distinctly, that it was not drawn in Paris 1st March, it would not follow that it was not drawn there at some other time, or that it was drawn in England. Drawing here with a foreign date, to evade the stamp duties, is a very serious offence, and the fact must be made out by distinct evidence. Verdict for plaintiff.

(13) Ex parte Manners, In re Voss, 1 Rose, 68. The Lincoln Bank took for valuable consideration and without notice two unstamped bills of exchange, one dated at Haerlem, and the other at Amsterdam: the acceptor having become bankrupt, the Lincoln Bank offered to prove under the commission; but, upon proof that the bills were really drawn in London, they were not allowed to prove: on petition, Lord Eldon C. thought the proof properly refused, and the petition was dismissed.

CHAP. IV.

Sect. 1. *Of the Alteration of Bills or Notes.*
2. *At what Time.*
3. *Onus of Proof in Case of Alteration.*

If a bill or note be altered in a material part (though by consent of all parties), after it has once issued, it requires (1) a new stamp;

Unless such alteration were to correct a mistake, and merely to make the bill what it was originally intended to have been, for in such case a new stamp is not necessary. (2)

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(1) Wilson v. Justice, 1796. A bill of nine months after date was, by consent of all parties, a fortnight after it had been delivered to the payee, altered to ten months after date. Lord Kenyon held a new stamp necessary, and nonsuited the plaintiff.

Bowman v. Nicoll, 5 Term Rep. 537. A bill dated 2d September, and payable twenty-one days after date, was, by consent of the acceptor, altered to fifty-one days after date: on 30th September it was with the like consent, and whilst it remained in the drawer's hands, restored to twenty-one days, but the date was altered to September 14th. Lord Kenyon nonsuited, and the Court held the nonsuit right.

(2) Kershaw v. Cox, 3 Esp. N. P. C. 246. In an action on a bill, it appeared that the defendant, who was the payee, had *endorsed* the bill to one K., by whom it was passed to the plaintiffs; that they, on discovering that the words, "or order," had been omitted, returned it the day after it was drawn, and the drawer, with the consent of the defendant, then inserted those words. Le Blanc J. held that no new stamp was necessary; that this was not a new instrument, as in Bowman v. Nicoll, but merely a correction of a mistake, and in furtherance of the original intention of the parties; and the plaintiffs had a verdict. A new trial was afterwards moved for, but the Court refused a rule. See 10 East's Rep. 437.

Jacob v. Hart, 6 M. & S. 142. Endorsee against acceptor: Defendant, when he accepted the bill, noticed that by mistake the date was March instead of April. The payee, upon communication with the drawer, altered the date to April, and the defendant subsequently approved of the alteration. Before the bill was negotiated, defendant, at the request of the drawer, wrote upon it, "payable at Mr. J.'s, St. Mary Axe, London." It was objected at the trial that these alterations made a new stamp necessary; but, Lord Ellenborough held the contrary; and on rule nisi for new trial, the Court were of opinion he did right. Rule refused.

Correcting the date, to make it what it was intended, will not affect a bill or note. (3)

Where an alteration will vacate a bill or note, it will have that effect, though it were made by a mere stranger. (4)

An alteration of a bill or note in a material part not only makes a new stamp necessary, but vacates the bill or note (independently of the stamp laws), except as between the parties consenting to such alteration. (*a*)

[If a bill or note be so carelessly written as to leave blanks in it where the same can be increased without giving it a suspicious appearance, and it is fraudulently altered to a larger sum, the parties to it will be liable for the larger sum to a *bonâ fide* holder. (*b*)

But where there has been no carelessness in writing the bill or note, which is afterwards fraudulently altered, or where the alteration gives it a suspicious appearance, the instrument will be rendered void by the alteration. (*b*)]

M'Intosh v. Haydon, 1 Ryan & Moody, 362. In an action by endorsee against acceptor, it appeared that defendant's acceptance was general, but that the holder added, "payable at Messrs. Ransom & Co.'s, bankers, London:" defendant was not privy to this addition, plaintiff was. In an action against defendant, he insisted that this alteration vacated his acceptance; and Lord T. held it did; because it altered the character of the bill, and would induce a holder to think Ransom and Co.'s the proper place to present it, not defendant's. The acceptance was after 1 & 2 Geo. 4. c. 78.

(3) Jacob v. Hart, suprà.

(4) Master v. Miller, 4 Term Rep. 320. 2 H. Bl. 141. In an action by endorsees against the acceptor of a bill, payable three months after date, to Wilkinson and Cooke, the declaration had one count upon the bill as dated the 20th March, and another as dated the 26th March. The jury found a special verdict, stating that the bill was drawn and dated the 26th March; that it was accepted; and that afterwards, and whilst it remained in the hands of Wilkinson and Cooke, the date was altered from the 26th to the 20th March, without the defendant's knowledge, and by some person unknown to the jury. That after such alteration it was endorsed for a valuable consideration by Wilkinson and Cooke to the plaintiffs. After two arguments, Lord Kenyon, Ashhurst, and Grose, Js. held, that the alteration, though by a stranger, vacated the bill; Buller J. differed; but on error, the whole Court was so clear that it was vacated that they would not hear a second argument, and judgment for the defendant was affirmed. See Henfree v. Bromley, 6 East's Rep. 309.

[(*a*) Pankey v. Mitchell, 1 Brease, 301.]

[(*b*) "When a bill already accepted and endorsed, is fraudulently altered from a smaller to a larger sum, in consequence of blanks being

Altering the (5) date, or sum, or (5) time for payment;

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left in it, and is afterwards discounted, all the persons whose names are upon it are liable for the full sum which the discounter bonâ fide paid. And in the case of Grahame v. Gilleepie & Co. 1795, June 25, where blanks had been left in a bill at the time of accepting, by means of which the drawer was afterwards enabled to increase the sum from 58*l.* 10*s.* to 458*l.* 10*s.*, without giving the bill a suspicious appearance, it was found that the acceptor was liable for the increased value to the endorsee who had discounted the bill." Glen on Bills, 65. "But if the alteration is so clumsily executed, that it is apparent upon inspection, the parties will not be liable for the increased sum. In the above case, accordingly the holder was on this ground found not entitled to recover on another bill for 50*l.* which had been altered to 450*l.* And it was further held, that he was not entitled under the bill to recover even the original 50*l.*" Glen on Bills, 65, note.

Both the above decisions conform nearly to the opinion of Pothier, who thinks a drawer would be liable who made the bill in such a way as to afford room for an alteration or addition, but not if he had taken proper precautions to prevent it; and that he would not be liable, if the falsification might be discovered on a careful examination, the person taking it in such case being to blame for his negligence. Poth. Pl. ch. 3. a. 4. n. 101. See also Glen on Bills, 96, who gives the opinions of Scaccia and Bouchier, and Young v. Grote, post, ch. viii. n. 12.

Harford and Eastman signed a note for twenty dollars. Harford afterwards, without the knowledge or consent of Eastman, inserted the words "*one hundred and*" before "*twenty*," and then passed it to the payee. It was held by the Supreme Court of New Hampshire, that Harford was not liable on the note. Goodman v. Eastman, 4 N. H. R. 455. The report of this case does not show the manner in which the alteration was executed, or whether there was any thing in the appearance of the note which ought to have excited the suspicion of the payee.]

(5) Walton v. Hastings, 4 Campb. 223. 1 Stark. 215. A bill drawn by Brooks in favor of plaintiff was dated 5th July. An agent of plaintiff's presented it for acceptance, and defendant, the drawee, desired to have the date altered to the 10th, which was done accordingly, and then defendant accepted it. Lord Ellenborough held that as the bill was issued before this alteration was made, and was a perfect, available instrument, the alteration made a new stamp necessary, and nonsuit.

Outhwaite v. Luntley, 4 Campb. 179. A bill drawn 5th March, was endorsed to J. S., who left it for acceptance. The drawees altered the date to 15th March, and then accepted it. In an action on the bill by endorsee against endorser, it was argued that this alteration vacated the bill. Lord Ellenborough was of that opinion, because the bill was a perfect instrument when issued to the endorsee, the alteration might embarrass parties who would expect notice or payment according to the original date, and the alteration made it a new bill, and made a new stamp necessary.

See Wilson v. Justice, and Bowman v. Nicoll, antè, p. 90. and Cardwell v. Martin, infrà. As to acceptances varying from the tenor of the bill, see Chapter VI.

or inserting words, rendering a bill or note (6) negotiable, which was not so originally; or inserting words in a bill or note originally expressed to be for value received generally, stating such value to have been received on a (7) particular account; or adding as a maker or drawer (8) a person not originally intended to have been so, is a material alteration, and makes a new stamp necessary.

[So, procuring a person to sign his name as a witness to a note who did not see the maker sign, is a material alteration in Massachusetts. (*c*)

[See also Stephens v. Graham, 7. Serg. and Raw. 505. Bank of U. S. v. Russell, 3 Yeates, 391.

Action on a note dated Sept. 10th, 1819. The note was in fact made on that day; but was originally written 1809, and had since been altered to 1819. There was no evidence that the maker of the note knew of the alteration. The Court held that the alteration in this case was material, and would render the instrument void, unless made by consent of the maker either express or implied, or under circumstances which would rebut the presumption of improper motives in making the alteration. Woodbury J. said, "And whether under all the testimony consent can here be implied, or the presumption be deemed rebutted, that the alteration was fraudulent, should be submitted to a jury." Bowers v. Jewell, 2 N. Hamp. R. 543.

But in Tennessee it has been held that the alteration of the date of the assignment of a note, did not avoid the right of action by the assignee against the maker of the note. Griffith v. Cox, Overton, 210.]

(6) See Kershaw v. Cox, antè. In Knill v. Williams, 10 East's Rep. 437., Le Blanc J. said, that Kershaw v. Cox could only be supported on the ground that the alteration was merely the correction of a mistake, for the alteration was a very material one.

[Inserting the words "*or order*" in a note, by the holder without the maker's consent, destroys its validity. Pepoon v. Stagg, 1 Nott and M'Cord, 102.]

(7) Knill v. Williams, 10 East's Rep. 431. Action on a note, by which, nine months after date, the defendant promised to pay to the plaintiff, or order, 100*l.* for value received, *for the good-will of the lease and trade of Mr. F. Knill, deceased.* It appeared at the trial before Le Blanc J., at Hereford, that the words in italics were added, by consent of both parties, on the day after the note had been signed and delivered to the plaintiff, without any new stamp being impressed upon it; upon this the plaintiff was nonsuited, and on a rule nisi to set aside the nonsuit, the whole Court held that the alteration was material, and therefore discharged the rule.

(8) See Clark v. Blackstock, antè.

[(*c*) Hall, whose name was written as the subscribing witness on a note, did not see the defendant sign the note; but the plaintiff long after the date of the note, brought it to Hall, and asked him to sign his name as a subscribing witness, which he did. The Court held that this was a material alteration of the note. Homer v. Wallis, 11 Mass.

So, striking out a special endorsement over the name of an endorser, is a material alteration; but if the alteration be made without any fraudulent intention, the Court will permit the special endorsement to be restored. (*d*)]

But inserting a mere memorandum to say where the bill or note is to be payable, if it give a right direction in that respect, is not a material alteration. (9)

Rep. 309. In Massachusetts, a note executed in presence of a subscribing witness, is excepted from the operation of the statute of limitations. See also Smith v. Dunham, 8 Pick. 246.

[(*d*) J. and T. G. Prentiss drew a bill on De Grand payable to the order of T. G. Prentiss. The bill was endorsed, "Pay to the order of J. T. Mason, Jr., Tho. G. Prentiss," and afterwards an endorsement by Mason to pay to the order of Nevins and Co., or to Nevins & Co. or order. The bill thus endorsed was accepted by De Grand. Nevins and Co. in order to avoid responsibility as endorsers, erased the endorsement over Mason's name, leaving Mason's endorsement in blank, and sold the bill, which was afterwards passed to Cabot. De Grand refused payment when the bill was presented by Cabot, on account of the erasure. Cabot then brought an action on the bill, and had the endorsement filled up so as to be payable to himself, but the Court held that he could not maintain the action. Nevins and Co. repaid Cabot the amount of the bill, and then brought their action against De Grand upon the bill. The plaintiffs asked leave of the Court to strike out the words endorsed in Cabot's action, and to restore the original words which made the bill payable to their order. Parker C. J. delivered the opinion of the Court. "It being clear that the words now moved to be restored, were stricken out with honest intentions; and that the acceptor has in no way been prejudiced thereby, or can be in any way injured by the restoration; justice requires, and the law allows it to be done. The bill never having been assigned by the plaintiffs, to take effect as was intended, the property remains in them, and they have a right to maintain the action." Nevins v. De Grand, 15 Mass. R. 436.]

(9) Trapp v. Spearman, 3 Esp. N. P. C. 57. In an action on a bill by an endorsee against the acceptor, the defence was, that the bill had been altered, by the insertion of the words, "When due, at the Cross Key's, Black Friars Road." But Lord Kenyon held that the alteration was immaterial, and the plaintiff had a verdict. See Jacob v. Hart, antè.

Marson v. Petit, 1 Campb. N. P. C. 82. n. Endorsee against acceptor of a bill; after acceptance, the drawer, without the consent or knowledge of the defendant, wrote under his name, "Prescott and Co." Lord Ellenborough held it immaterial.

[But see Desbrow v. Weatherly, 6 C. & P. 758.

Woodworth was sued as endorser of a note. After the note was made and endorsed, Kane, the maker, without the knowledge of Woodworth, wrote in the margin of the note, "Payable at the Bank of America, James Kane." The Court held that this was not a material alteration, and did not invalidate the note. Bank of America v. Woodworth, 18 Johns. R. 315.

[Nor is writing under the name of the drawer the words, "left with Mr. B. as collateral." (*e*)

Cancelling an acceptance by mistake, does not vitiate a bill. (*f*)]

So, correcting the address or style of the drawee, so as to make it accord with the acceptance, will not affect a bill. (10)

But altering an acceptance, so as to give an unwarranted place for payment, vacates the acceptance. (11)

And altering the place where a bill or note is payable, if for a fraudulent purpose, may be a capital forgery. (12)

This decision was afterwards reversed in the Court of Errors, who considered the addition of the place of payment as a material alteration. Eighteen votes for reversing, ten, including the Chancellor, for affirming. S. C. 19 Johns. R. 391.]

[(*e*) Bachellor v. Priest, 12 Pick. 399.]

[(*f*) Harris v. Packer, Tyrw. R. 370, note; S. P. Novelli v. Rossi, 2 Barn. & Adol. 757.]

(10) Farquhar v. Southey, 1 Moody and Malkin, 14. A bill was addressed to "Messrs. Southey, Crowther & Co.," they accepted it in the firm of "Southey and Crowther." The bill, when produced, appeared altered so as to make the address agree with the acceptance, "Messrs. Southey and Crowther:" whether the alteration was before or after the acceptance, did not appear. Littledale J. thought the alteration, whenever made, immaterial; and verdict for plaintiff.

(11) Tidmarsh v. Grover, 1 Maul. & Sel. 735. Defendant accepted a bill so as to make it payable at Bloxam and Co.'s: Bloxam and Co. failed, and the holder, without defendant's knowledge or consent, struck out their names, and substituted Esdaile and Co.'s. On point reserved whether this alteration vacated the acceptance, the whole Court held it did, and plaintiff was nonsuited.

Cowie v. Halsall, 4 Barnew. & Ald. 197. In an action by endorsee of a bill against the acceptor, it appeared that the acceptance was general, and that the drawer, without the defendant's knowledge, added to it "Payable at Mr. B.'s, Chiswell Street;" and on the ground that this was a material alteration, and vacated the acceptance, verdict for defendant. A motion was made for a new trial, but the Court thought the verdict right; for, this alteration would lead to a presentment at B.'s, not at defendant's, and the bill might be treated as dishonored, and defendant be arrested thereon, without any presentment where he would expect it; and a rule was refused. M'Intosh v. Haydon, antè, p. 91.

(12) Rex v. Treble, 2 Taunt. 328. Kellaway issued 10*l.* notes payable at Fordingbridge, or at Wilkinson & Co.'s, London: these notes were re-issuable; several of them were paid in town, and stolen on their way back to Fordingbridge: Wilkinson & Co. failed, and the prisoner, who had got one of these notes, covered the names of Wilkinson & Co. with a small piece of paper containing the names of Ramsbottom & Co. and re-issued the note: he was indicted for forgery and convicted; and on argument before the twelve Judges, this was

[The interlining of a word which the law would have supplied, does not vitiate a bill or note. (*g*)

And where the sum in a note is left partly blank by mistake, it is not a material alteration, and will not vitiate the note to fill up the blank with the sum intended by the parties. (*h*)

Where a note is signed by principal and surety, and the principal, without the knowledge of the surety, alters the sum in the note to a less amount and then gives it to the payee, this alteration will not render the note void as against the surety, who is benefited by the alteration. (*i*)

If the holder of a note erases an endorsement of a payment, which endorsement ought not to have been made, it does not vitiate the note. (*k*)]

Sect. 2.—A bill or note is, primâ facie, to be considered as

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held a forgery; for, substituting a solvent house as one of the places of payment instead of an insolvent one, varied the credit of the note; and though Kellaway by the real note answered for no payment in London but at Wilkinson & Co.'s, this alteration made him answerable for it at Ramsbottom's.

[(*g*) A note was written payable on "the 25th of Dec. in the of our Lord, omitting the word *year*, which word was interlined before the trial. Parsons C. J. delivered the opinion of the Court. "The law would have supplied this word, and without the insertion of it the note would have supported a count on a promise to pay on the 25th of Dec. in the year of our Lord 1805. We are therefore of opinion that the actual insertion of the word *year*, which the law would clearly have supplied, is no such alteration as will annul the contract, if it was interlined by the promisee without consent; and if it were an immaterial alteration, the law will reasonably presume an assent of the promisers to the making of it." Hunt v. Adams, 6 Mass. R. 519. See also Bowers v. Jewell, 2 N. H. R. 543. See also Boyd v. Brotherson, infra.]

[(*h*) Boyd v. Brotherson, 10 Wendell, 93. Action against the endorser of a note for 800 dollars, made by M'Clelland. The note was made for the benefit of M'Clelland, and the defendant was an accommodation endorser. The evidence showed that it was the intention of the parties that the note should be for 800 dollars, but that when it was signed by M'Clelland and endorsed by the defendant, by mistake the word *eight* only was written with a blank after it, and that M'Clelland, before passing it to the plaintiffs, inserted the word *hundred* in the blank and interlined the word *dollars*. A verdict having been found for the plaintiffs, a new trial was denied.]

[(*i*) Ogle v. Graham, 2 Penn. R. 132.]

[(*k*) Kimball v. Lamson, 2 Verm. R. 138.]

issued as soon as it is passed away by the drawer or maker (13), or accepted by the drawee (14);

Not before. (15)

If two persons exchange acceptances, each bill is to be considered as issued as soon as the exchange is made, and any alteration afterwards will make new stamps necessary. (16)

But a bill is not to be considered as issued, so as to make a new stamp necessary, until it is in the hands of some one who is entitled to make a claim thereon; (17)

Though it be accepted and endorsed; (17)

And an alteration thereon without the knowledge of acceptor or endorser, though it will entitle them to consider their acceptance or endorsement vacated if they do not assent thereto, will be binding upon them if they assent. (17)

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(13) See Walton v. Hastings, ante p. 92. Euthwaite v. Luntly, ante 92. Knill v. Williams, ante p. 93.

(14) See Tidmarsh v. Grover, and Cowie v. Halsall, ante p. 93.

(15) Kennerly v. Nash, 1 Stark. 452. Maule drew a bill upon Nash at three months, payable to his (Maule's) order, and sent it to Nash for acceptance: Nash sent it back to Maule, and desired him to let the bill be at four months instead of three: Maule assented, and the bill was altered accordingly. On question whether this made a new stamp necessary, Lord Ellenborough held it did not, and the plaintiff had a verdict.

(16) Cardwell v. Martin, 9 East's Rep. 190. On the 3d of June, 1807, the defendant and Giles & Co. exchanged acceptances; on the 23d, before either of the bills had been passed away, they altered the dates to the 23d; the bills were payable at a certain period after date. Lord Ellenborough thought a new stamp necessary, and nonsuited the plaintiff, with liberty to move to set aside the nonsuit: on motion accordingly, the whole Court thought that the exchange of acceptances was a negotiation of each bill, and that the subsequent alteration rendered a new stamp necessary. Rule refused.

N.—Each bill was payable to the drawer's order, and the plaintiff was a bonâ fide endorsee.

(17) Downes v. Richardson, B. R. Easter Term, 1822. Upon an issue from Chancery, on the question whether Thompson, as acceptor of a bill of exchange, was indebted thereon to Downes, an endorsee; it appeared in evidence that the bill was drawn by Raines to his own order upon Thompson, accepted by Thompson and endorsed by Raines and Lachlan; that its date was the 6th March; that Raines, Thompson, and Lachlan were in the habit of putting their names for each other upon bills, and that Thompson and Lachlan put their names upon this bill to enable Raines to pass it. Raines put it into the hands of an agent; and he could not pass it till 10th April, when he paid it for value to Howell, who passed it for value to plaintiff. Before it was paid to Howell, the date was altered to the 16th of March: Thompson

[Where a note, blank as to amount and date, was signed by the maker, and left with the payee to fill up the blanks and get it discounted, and the payee filled the blanks, but before passing the note altered the date, it was held to be void as against the maker. (*l*)]

Sect. 3.—If a bill or note appear upon the face of it to have been altered, it is for the holder to prove that it was altered under circumstances which make it still available. (18)

If the alteration be in the hand-writing of the acceptor, the holder must prove that such alteration was made before the bill was parted with by the drawer. (19)

But proof that it was in the drawer's hands after it was accepted, will be primâ facie evidence for that purpose. (19)

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did not know of this alteration till after the bill was paid to Howell, but as soon as he knew of it he assented to it. It was urged for defendant, that this alteration made a new stamp necessary; but upon a case reserved, the Court thought otherwise; for, though the bill had names upon it, so as to give it the semblance of an available bill before it was paid to Howell, it was not in fact an available bill till that payment; no person could have made a claim upon it, and if not, it was not to be considered as issued till that period, and then the alteration was in time; and though Thompson would not have been bound by the bill in its altered state, had he not assented to the alteration, but might have insisted that the alteration cancelled his acceptance, his subsequent assent bound him, and revived and continued his acceptance.

[(*l*) Mitchell v. Ringold, 3 Har. & John. 159.]

(18) Henman v. Dickinson, 5 Bing. 183. In an action by endorsee against acceptor, it appeared upon the face of the bill to have been altered from 40*l.* to 49*l.*, and the drawer's wife was called by defendant to prove that the drawer altered it after the acceptance: her admissibility was objected to on the ground that her testimony criminated her husband, and that point was reserved; but Best C. J. being of opinion, that the onus of proof, to show that the alteration was made before the acceptance, lay upon the plaintiff, a verdict was given for defendant; and on motion to set aside that verdict, the Court agreed with him in opinion, and refused the rule.

Bishop v. Chambre, 1 Moody & Malkin, 116. In an action on a note, the paper and date exhibited a suspicious appearance, as if a former date had been cut off and another (May) substituted: Lord Tenterden told the jury, it certainly lay on plaintiff to account for the suspicious form and obvious alteration of the note; and if they thought the alteration made after the note had been delivered to defendant, and became a perfect instrument, they should find for defendant, which they did.

(19) Johnson v. Duke of Marlborough, 2 Stark. 313. In action by

If the bill were put into an agent's hands to pay away, and it be left in doubt whether the date was altered before he paid it away or afterwards, it will not be sufficient. (20)

[Where the acceptance of a bill appears to have been altered, the party producing it must prove that the alteration was made at the time of the acceptance. (*m*)

Where the defence to an action on a bill is, that it has been altered by the plaintiff, evidence that he has altered other bills is not admissible for the defence. (*n*)]

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endorsee against acceptor on bill payable to the drawer's order, the bill on production appeared to have been dated originally 29th December, 1816, but the date was altered to 29th January, 1817, and the alteration which was immediately above the acceptance, was proved to be in defendant's hand-writing. Abbott J. intimated, that he must have proof that the alteration was made before the drawer endorsed away the bill; for, otherwise, a new stamp would have been necessary. Proof was then given that the bill was in the drawer's hands after defendant had accepted it, and that was considered primâ facie proof that it had not been previously negotiated.

(20) In Downes v. Richardson, ante, p. 97, it was at first left in doubt when the date was altered, whether before or after the payment to Howell, and then the Court inclined against the plaintiff; it was afterwards ascertained that the alteration was before that payment.

[(*m*) Taylor v. Mosely, 6 C. & P. 273.]

[(*n*) Thompson v. Mosely, 5 Car. & P. 501.]

CHAP. V.

Sect. 1. *Of the Transfer of Bills or Notes.*
How — by Delivery.
——— *Endorsement.*
——— *blank.*
——— *full.*
——— *restrictive.*
——— *of the whole Sum.*
2. *By whom.*
——— *Thief or Finder.*
——— *Bailee for Special Purpose.*
——— *Person of the same Name as the Payee.*
——— *Trustee.*
——— *in case of several unconnected Payees.*
——— *in case of Feme Payee marrying.*
——— *in case of Feme Covert Payee.*
——— *Infant.*
——— *in case of Death of the Payee or Holder.*
——— *Bankruptcy of the Payee or Holder.*
where some of several Partners, Payees, become Bankrupt.
where the Bankrupt held as Trustee.
—— *the Consideration of the Bill or Note fails.*
——— *neither Payee nor Assignee can demand Payment.*
—— *the Bankrupt obtained the Bill or Note by Fraud.*
—— *The Bailee of a Bill or Note, having a Lien thereon, delivers it to the Payee when due, to obtain Payment.*

Sect. 2. (*continued*)—*By whom in case of Bankruptcy of the Payee or Holder, where the Holder is an Agent, and the Bill or Note was remitted by his Principal.*
where the Holder is a Banker, and the Bill or Note was delivered to him by his Customer.
——— *Agent, or Executor.*
3. *When.—After due.*
——— *after Acceptance refused.*
——— *in case of Checks.*
——— *after actual Payment.*
——— *before filling up.*
Of Bills in Sets.
Obligation of Endorsement.
Or Delivery.

Bills or notes payable to order, or to bearer, or containing any words to make them assignable, may be assigned so as to give the assignee a right upon the bill or note against all the antecedent parties; and bills or notes containing no words to make them assignable may, where the stamp laws do not prevent it, be assigned so as to give the assignee a right upon them against the assignor, but (1) not so as to give him a right against any of the antecedent parties.

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(1) Hill v. Lewis, Salk. 132. Moor drew one note payable to the defendant, or to his order, and another payable to him generally, without any words to make it assignable; the defendant endorsed them to Zouch, and Zouch to the plaintiff; the first objection was that the plaintiff had been guilty of laches, but the jury thought he had not: and it was then urged that the second note was not assignable; and Holt C. J. agreed that the endorsement of this note did not make him that drew it chargeable to the endorsee, for the words "*or to his order*" give authority to assign it by endorsement; but the endorsement of a note which has not these words is good so as to make the endorser chargeable to the endorsee.

[Ames endorsed a note payable to himself, but not to his order, to secure a debt due from the maker to Josselyn, to whom it was given. Josselyn wrote a guaranty over Ames's name, and sued him as guarantor. No demand or notice was proved. The Court held the action not maintainable, because the payee could not "himself warrant to a third person payment of a note payable to himself." But the Court said

[But a bill or note payable to order, may be transferred by the payee by delivery only, or other mode of assignment, so far as to enable the assignee to maintain an action upon it in the name of the original payee. The defendant, however, in such case may set off any payment or other demands against the payee, which he had previously to notice of the assignment, but none arising subsequently. (*a*)

Where a bill has been transferred by delivery from the payee to several persons, without his endorsing it, any one of the holders may sell his interest in the bill to the others. (*b*)

A new promise made to the holder of a note to pay it, which takes it out of the operation of the statute of limitations, accrues to the benefit of a subsequent endorsee. (*c*)]

But it has been doubted, whether an English note is transferable abroad. Lord Tenterden said, it was a question of great importance, upon which he should be unwilling to give an opinion without hearing it very fully discussed, and giving it very great consideration. (2)

Bills and notes are assigned either by delivery only, or by endorsement and delivery. Whilst payable to order, they are assignable by the latter mode only; if payable originally to bearer, or if endorsed, as (3) they may be, so as to be payable to the bearer, by either.

On a transfer by delivery only, without endorsement, the person making it ceases to (4) be a party to the bill or note:

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that the plaintiff might cancel what he had written, and instead thereof write, "For value received I undertake to pay the money mentioned to E. J." and upon this endorsement might maintain an action. Josselyn v. Ames, 3 Mass. R. 274.]

[(*a*) Jones v. Witter, 13 Mass. R. 305. Parker C. J. said, "There is no sensible ground upon which a writing shall be held necessary to prove an assignment of a contract, which assignment has been executed by delivery, any more than an assignment of a personal chattel."]

[See also Hughes v. Harrison, 2 Miller, 89.]

[(*b*) Titcomb v. Thomas, 5 Greenl. 282.]

[(*c*) Little v. Blunt, 9 Pick. 488.]

(2) De la Chaumette v. Bank of England, 9 Barn. and Cr. 217.

(3) See post. [See also Brush v. Reeves, 3 Johns. R. 435; Eccles v. Ballard, 2 M'Cord, 388.]

(4) Vide Ld. Raym. 442. 774. 929. 930. 12 Mod. 203. 241. 408. 517. 521. Salk. 124. 126. 3 Salk. 68. Comb. 57.

on a transfer by endorsement, he (5) is, according to the legal operation, a new drawer.

[The endorsement of a note passes no interest to the endorsee, as long as the endorser retains it in his possession. (*d*)

A person who sells a bill without becoming a party to it, incurs no liability, in case the bill is dishonored. (*e*)

In Louisiana a note can be sold on execution. In an action upon a note payable to a certain person or bearer, sold on execution, brought by the purchaser against the maker, the defendant cannot inquire into the regularity of the proceedings previously to the issuing of the execution under which the sale took place. But if the sale be not made according to law, the purchaser does not acquire any title. (*f*)]

Upon bills and notes for the payment of less than 5*l*. the endorsement (6) must be attested by a subscribing witness.

No particular (7) words are essential to an endorsement; the mere signature (8) of the endorser is in general sufficient.

But the endorsement of a bill or note for the payment of less than five pounds must (9) mention the name and place of abode of the endorsee, and bear date at or before the time of making it.

[The mere initials of a person's name endorsed on a check, have been held sufficient to charge him as endorser. (*g*)]

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(5) Smallwood v. Vernon, Str. 478. In an action against the endorser of a note, the declaration stated that he became chargeable according to the tenor of the endorsement; and it was objected that the endorsement might appoint the payment at a time different from that mentioned in the note; sed per cur. if it did, it would charge the endorser, for every endorsement is the same as making a new note. Vide 2 Show. 501. Comb. 32. Skinn. 255. 256. 342. 411. 3 Mod. 87. 12 Mod. 36. Ld. Raym. 181. 444. 744. Salk. 125, 132, 133. 3 Salk. 68. Str. 442. 479. 1 Atk. 282. 2 Atk. 182. Burr. 670. 675. Dougl. 613. [See also Eccles v. Ballard, 2 M'Cord, 388; Galpin v. Hard, 3 M'Cord, 394.]

[(*d*) Clark v. Boyd, 2 Hamm. 56; Ramsay v. Livingston, 18 Martin, 15.]

[(*e*) Wilkins v. M'Kenzie, 2 Hayw. 277.]

[(*f*) Wilson v. Munday, 5 Miller, 483.]

(6) 17 Geo. 3. c. 30. s. 1.

(7) Vide Holt, 117. Ld. Raym. 176. 810.

(8) Vide 12 Mod. 192. 244. Salk. 126. 128. 130. Ld. Raym. 444.

(9) 17 Geo. 3. c. 30. s. 1.

[(*g*) Merchants' Bank v. Spicer, 6 Wend. 443.]

A promise to endorse, though on sufficient consideration, cannot be treated as an actual endorsement. (10)

Nor will it preclude the party from proving that an endorsement afterwards in his name is a forgery. (10)

But delivery without endorsement, where endorsement is essential, and where it is omitted by mistake, will entitle the party to call for an endorsement afterwards; (11)

And if the party, who ought to have made it, afterwards become bankrupt, will prevent his assignees from claiming the bill or note. (11)

An endorsement which mentions the name of the person in whose favor it is made, is called a full endorsement; an endorsement which does not, a blank one.

A blank endorsement, so long as it continues blank, makes a bill or note payable to the bearer (12); but the holder may write over it what he pleases. (*h*)

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(10) Moxon v. Pulling, 4 Campb. 50. Defendant had accepted a bill he could not pay, and referred the holder to one May, to whom, he said, he had lent the acceptance. May proposed that plaintiff should take an acceptance of Hullet & Co., and that defendant should endorse it: defendant agreed, and said he would go and endorse it. Four days afterwards May sent plaintiff Hullett & Co.'s acceptance, with an endorsement in defendant's name; and plaintiff gave up defendant's acceptance: the endorsement in defendant's name was a forgery, and defendant being sued as endorser, Lord Ellenborough said, "You cannot establish any agency to endorse: when the promise was given, the bill does not appear to have existed, and all was *in fieri;* defendant might repent and refuse to endorse; he may be liable for breach of promise, but cannot be sued as endorser." Nonsuit.

(11) See Smith v. Pickering, post.

(12) Peacock v. Rhodes, Dougl. 611—633. A bill was drawn by the defendant, payable to Ingham or order. Ingham endorsed it in blank, after which it was stolen; the plaintiff took it *bonâ fide*, and paid a valuable consideration for it, and acceptance and payment being refused, gave notice to the defendant, and brought this action. A case was reserved for the opinion of the Court, and it was contended that this bill was not to be considered as payable to bearer, and that the plaintiff had no better right upon it than the person of whom he took it; but the Court said, there was no difference between a note endorsed in blank, and one payable to bearer, and the plaintiff had judgment. Francis v. Mott, N. P. before Lord Mansfield, cited Dougl. 612, was a similar case, and the attorney-general, who was for the defendant, after attempting unsuccessfully to show that the plaintiff *knew* the bill was obtained unfairly, gave up the cause.

(*h*) Williams v. Matthews, 3 Cowen, 252, c. 9, post.

In Louisiana the title of the holder of a bill or note, whether trans-

And the holder, by writing a direction over the endorsement, ordering the money to be paid to particular persons, without adding his own name, does (13) not become an endorser.

As long, however, as the first endorsement continues blank, the (14) bill or note, as against the payee, the drawer, and acceptor, is assignable by mere delivery, notwithstanding it may have upon it subsequent full endorsements.

[The holder of a bill or note cannot write over a blank endorsement, such an agreement as will discharge him from the obligation of due diligence in making a presentment and giving notice. (*i*)

A blank endorsement ought to be filled up before a bill or note is read to the jury and before judgment on it. (*k*)

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ferred by blank endorsement or by delivery, when the instrument is payable to bearer, is in both instances a matter *en pays*, if unsupported by authentic evidence, and the holder, without such evidence, cannot legally proceed in the *via executiva*, on a mortgage given to secure payment. Lee v. Dearmond, 4 Miller, 320.

The expression in the text that the holder may write over it what he pleases, must not be understood to imply that the holder can write any thing over the endorser's name which shall make the endorser liable to any greater extent or in any other manner than the law makes endorsers liable. Where the holder of a note had written over an endorser's name "For value received I assign this note to Robert Thompson, and stand security till paid;" it was held, that the endorser was not liable on this special agreement. Clawson v. Gustin, 2 South. R. 821.]

(13) Vincent and another v. Horlock and another, 1 Campb. N. P. C. 442. In an action against the defendants as endorsers of a bill, it appeared that the payee had endorsed it in blank to the defendants, and that they had written over the payee's signature, "Pay the contents to Vincent and Co." Lord Ellenborough was clearly of opinion that this was not an endorsement by the defendants; and the plaintiffs were nonsuited.

(14) Smith v. Clark, Peake 225. A bill was endorsed in blank by the payee, and after some other endorsements was endorsed to Jackson or order; Jackson sent it to Muir and Atkinson, but did not endorse it' and Muir and Atkinson discounted it with the plaintiffs: the plaintiffs struck out all the endorsements except the first, which continued blank. This was an action against the acceptor, and it was objected, that the plaintiffs could not recover without an endorsement by Jackson: but Lord Kenyon held otherwise, and the plaintiffs recovered. The plaintiffs afterwards proved that Jackson desired Muir and Atkinson to discount this bill, but Lord Kenyon thought the plaintiff's case made out without this evidence.

[(*i*) Hill v. Martin, 12 Martin, 177.]

[(*k*) Ray v. Lyon, 6 Har. & John. 140. Hudson v. Goodwin, 5 Har. & John. 115.]

But the holder may fill up the blank endorsement at the trial. And if this be not done at the trial it is a matter of form, for which a judgment in favor of the holder will not be reversed by a superior court. (*l*)

The holder of a bill or note endorsed in blank can maintain an action on it without filling up the blank. (*m*)

The holder of a bill or note, even at the trial, and after it has been read to the jury, may strike out any endorsements which are not stated in the declaration, though an objection has been made on account of the variance. (*n*)

And if the endorsements be not in fact struck out at the trial it is of no consequence. (*o*)]

A full endorsement may restrain the negotiability of a bill or note. (*p*)

[The holder of a note endorsed in blank, who has written an endorsement over the name of the endorser, making the note payable to an agent, to whom it is transmitted, to obtain payment; may strike out the endorsement when the note is returned to him. (*q*)]

[(*l*) United States v. Barker, 1 Paine, 156. But see Ray v. Lyon, 6 Har. & John. 140; and Hudson v. Goodwin, 5 Har. & John. 115.]

[(*m*) Nerault v. Dodd, 3 Miller, 430.]

[(*n*) Dickinson v. Van Noorden, 497; Mayer v. Jadis, 1 M. & Rob. 247. See also Smith v. Clark, supra; Thompson v. Robertson, 4 Johns. R. 27; and Ritchie v. Moore, 5 Munf. 388; Morris v. Foreman, 1 Dall. 103.]

[(*o*) Dugan v. United States, 3 Wheat. 172. See also United States v. Barker, 1 Paine, 156.]

[(*p*) Where a note is endorsed to A. or order, the property of the note is passed to A., and nothing but cancelling this endorsement, or A.'s endorsing the note, would divest him of the legal title; not even an assignment by him under hand and seal. Burdick v. Green, 15 Johns. R. 247.]

[(*q*) Spencer C. J. delivered the opinion of the Court. "The defendant is sued as first endorser of a note. Over the name of Peter Smith (the defendant) there was written when the note was presented for payment, 'pay to the order of W. Fish, Esq. Cashier, &c.' This endorsement was thus filled for the safety of transmission, by the plaintiffs' direction, who were owners of the note. The endorsement was afterwards erased, and the note directed to be paid to the plaintiffs. Fish never had any interest in the note. It was sent to him merely to collect, and not being paid he sent it back. He was the mere servant or agent of the plaintiffs; and it is, I think, clearly settled, that in such a case the plaintiffs had a right to strike out the transfer and make the note payable to themselves." Bank of Utica v. Smith, 18 Johns. R. 230.]

An endorsement is restrictive, which has express words making it so, or is made in favor of a person who cannot make a transfer.

Thus an endorsement in these words, "Pay the contents to I. S. only," "to I. S. (15) for my use;" or, (at least when addressed to the drawee) (16), "the within must be credited to I. S.," is restrictive.

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(15) Per Wilmot J. Burr. 1227. Blackst. 299. The payee may check the currency of a bill or note by giving a bare authority to receive the money; as, "Pay to A. for my use;" and per Lord Hardwicke in Snee v. Prescott, 1 Atk. 249. "Bills and notes are frequently endorsed in this manner, 'Pray pay the money to my use,' in order to prevent their being filled up with such an endorsement as passes the interest."

Sigourney v. Lloyd, 8 Barn. & Cr. 622. 5 Bing. 525. Plaintiff endorsed a bill for 3164*l.* 11*s*, 8*d.* to S. Williams in these words, "Pay to Samuel Williams, Esq. of London or his order for my use:" the day after Williams received it, he discounted it with defendants, his bankers, and they applied the produce and other moneys of Williams, the same day, to take up Williams's acceptances. Defendants having received the money upon this bill, plaintiff insisted he was bound to pay it over to him, the state of accounts and transactions between plaintiff and Williams not having warranted Williams to part with the bill, and the endorsement being restrictive: case with liberty to turn it into a special verdict, and on argument Lord Tenterden and Bayley J. (the only Judges in Court) thought it clear that the endorsement was restrictive; that the defendants discounted it at their peril; and that, at all events, the application of the produce to Williams's acceptances, when the state of accounts between Williams and plaintiff did not justify such application, could not be supported: postea to plaintiff. The defendant brought a writ of error: the Court of Exchequer Chamber agreed with B. R., and the judgment was affirmed.

[Power v. Finnie, 4 Call, 411. This was an action against the drawer of a bill, which had been endorsed to the plaintiff in these words, "Pay the within contents to Jack Power only." The Court considered the endorsement restrictive, and as evidence that Power was merely agent to receive the money, though liable to be rebutted by other evidence; and it was held that evidence to show that the payee who endorsed it to Power was merely agent for the drawer, was properly received at the trial.]

(16) Ancher v. Bank of England, Dougl. 615. 637. A bill was drawn by the plaintiffs upon Claus Heide and Co. payable to Jens Mœstue or order. Mœstue endorsed it to this effect: "The within must be credited to Captain M. L. Dahl, value in account," and sent it to Claus Heide and Co., who credited Dahl for the amount, and gave notice to Dahl and the plaintiffs that they had done so; an endorsement by Dahl was afterwards forged upon the bill, and the bank discounted it. Claus Heide and Co. having become insolvent, Fulgberg paid it for the honor of the plaintiffs, and upon the ground that the endorsement had restrained the negotiability of the bill, they brought an action for money

An endorsement, "Pay the contents to A. B. on my being gazetted ensign in a given time," is restrictive, and will give no subsequent endorsee a right, unless he be so gazetted. (17)

An endorsement, "Pay to A. or order, for account of B.," will not prevent A. from endorsing for value, if it be under circumstances which may induce a belief that such value is to be applied to B.'s use; (18)

But it will from endorsing by way of pledge for the private debt of A.; (18)

Or for advances to A. on his own account.

But an endorsement is not restrictive, merely because it expresses what is the consideration for it.

Therefore this endorsement, "Pay the contents to I. S.,

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had and received against the Bank. Lord Mansfield directed a nonsuit; but upon a rule to show cause why there should not be a new trial, and cause shown, Lord Mansfield, Willes, and Ashhurst, Js. thought the endorsement restrictive, and that the plaintiffs were entitled to recover; but Buller J. thought otherwise; upon which Lord Mansfield said, the whole turned on the question, whether the bill continued negotiable? and if they altered their opinion, they would mention the case again; but it never was mentioned afterwards, and upon a new trial Lord Mansfield directed the jury to find for the plaintiffs which they did.

(17) Robertson v. Kensington, 4 Taunt. 30. Bill payable to plaintiff or order: he endorsed it, "Pay the within to Clerk and Ross, or order, upon my name appearing in the Gazette as ensign in any regiment of the line between the 1st and 64th, if within two months from this date:" the bill was at forty-five days after date: defendants accepted it after it was so endorsed: Clerk and Ross endorsed it over, and after passing through several hands it came to the bank, and defendants paid it: plaintiff's name was never in the Gazette, and he therefore insisted the payment by defendants was wrongful, and that he was entitled to the money. He accordingly brought an action, and on a case reserved, the Court was of that opinion, and decided for the plaintiff.

(18) Treuttel v. Barandon, 8 Taunt. 100. Two bills were endorsed "Pay to J. P. De Roure, Esq. or order, for account of Messrs. Treuttel and Wurtz:" De Roure endorsed them, and gave them to defendants as a security on his own account: he was indebted to them at the time to more than the value of the bills, and they afterwards advanced him money on these bills: De Roure failed, and Treuttel and Wurtz brought trover for the bills. Gibbs C. J. thought this endorsement sufficiently intimated that the bills were not the property of De Roure, and under his direction, verdict for plaintiffs: and on rule nisi for new trial, the Court thought, that though he might not be restricted from discounting, and might pass a good title to a person who might suppose they were passed to the use of plaintiffs, he could not pledge them on his own account, and rule discharged.

being part of the consideration in a certain deed of assignment, executed by the said I. S. to the endorser and others," is (19) not restrictive.

And the (20) mere omission of words to give a power of transfer, will not make an endorsement restrictive.

A restrictive endorsement precludes the person in whose favor it is made from making a transfer so as to give a right of action against either the person making it, or any of the antecedent parties; and if payment be made to the person to whom such transfer is made, the party paying may, under circumstances, be liable to pay the money a second time (21), or the person receiving it may be liable to refund. (22)

[Whether a guaranty of a note endorsed on it and signed by the payee, restrains its negotiability seems not to be settled. (*r*)

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(19) R. Potts v. Reed, 6 Esp. N. P. C. 57.

(20) Moore v. Manning, Com. 311. A note was drawn by the defendant payable to Statham or order; Statham endorsed it to Witherhead, but did not add "or to his order," and Witherhead endorsed it to the plaintiff. The defendant contended, that as there were no express words to authorize Witherhead to assign it, he had no such power, but the whole Court resolved, that as the bill was at first assignable by Statham as being payable to him or order, and as all Statham's interest was transferred to Witherhead, the right of assigning it was transferred also, and the plaintiff had judgment.

Acheson v. Fountain, Str. 557. Bull. N. P. 275. A bill was payable to Abercrombie or order, and he endorsed it thus, "Pray pay the contents to Louisa Acheson." This being stated in the declaration as an endorsement to Acheson or order, it was objected that it was a fatal variance; but upon consideration the whole Court was of opinion against the objection, because this was the legal import of the endorsement, and Louisa Acheson was authorized by it to make an endorsement over.

Edie v. East India Company, Blackst. 295. Burr. 1216. A foreign bill drawn upon the East India Company was payable to Campbell or order; Campbell endorsed it to Ogilby, but did not insert the words "or order," or any similar words in the endorsement; Ogilby endorsed it to to the plaintiffs. It was insisted, that under the endorsement to Ogilby he had no authority to endorse it over, and upon that ground the jury found for the defendants; but upon a rule to show cause why there should not be a new trial, and cause shown, the Court was clear, that as the bill was originally in its nature negotiable, it continued so in the hands of Ogilby, and that his endorsement was good; and a new trial was granted.

(21) Vide Robertson v. Kensington, ante, p. 108, note.

(22) Vide Ancher v. Bank of England, ante, p. 107, note (16). Sigourney v. Lloyd, ante p. 107, note (15).

[(*r*) The Supreme Court of Massachusetts, in one case, seem to be

An endorsement to pay to A. at his own risk does not restrain the negotiability of a bill or note (*s*); nor an agreement, written on a bill over the name of the endorser to pay damages in case the bill is protested. (*t*)

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of opinion that a guaranty endorsed on a note, by the promisee, destroys the negotiable quality of the instrument; and that no action can be maintained against him as endorser; or as guarantor, except by the original party to the guaranty. Binney holding a note of Fales, payable to Binney or order, some time after the note became payable, made and signed the following endorsement. "Dec. 13th, 1805. I guaranty the payment of the within note in 18 months, provided it cannot be collected of the promisor before that time." Tyler sued Binney upon this guaranty; but it appeared that Tyler was not the party to whom the guaranty was originally made. Sewall J. delivered the opinion of the Court. "The present plaintiff was not the party to the guaranty or assignment, when it was made: and no evidence has been offered of any subsequent privity or assent between him and the defendant. The guaranty, taken independently of the note, is a promise not negotiable, being conditional and not absolute; and connected with it, the supposition is altogether unreasonable and improbable, of any unlimited currency being intended for the note itself at the risk of the endorser." Nonsuit. Tyler v. Binney, 7 Mass. R. 479.

But in a subsequent case the same Court held that such an endorsement did not destroy the negotiable quality of the instrument.

Prince holding a note of Turner payable to himself, endorsed two days after the making of the note, "I guaranty the payment of this note within six months, Andrew H. Prince," and passed it to Faulkner, who passed it to Upham. Upham sued Prince as endorser. "Per Curiam. We are all of opinion that the note did not lose its negotiability by this special endorsement, any more than it would, if it had been endorsed with the words, 'without recurrence to the endorser.' The defendant's engagement amounts to a promise that the note should at all events be paid in six months. Now this promise may not be assignable in law; and yet the note itself may be assignable by the party to whom it was so transferred, so that upon non-payment of it by the promiser, the holder would have a right of action against Prince." Defendant defaulted. Upham v. Prince, 12 Mass. R. 14.

In Louisiana it was held, that where the payee of a negotiable note wrote upon it, "I guarantee the payment of this note, E. M." and passed it to a third person, that this did not make the person who received it an endorsee. Canfield v. Vaughan, 8 Martin, 682.]

[(*s*) Rice v. Stearns, 3 Mass. R. 225.]

[(*t*) Lajus, payee of a bill of exchange, endorsed it "should the within exchange not be accepted and paid agreeably to its contents, I hereby engage to pay the holder, in addition to the principal, 20 p. c. damages. Dominique Lajus." In an action against the drawee, Parsons C. J. delivered the opinion of the Court. "The endorsement is evidence of a transfer of the bill, without naming the endorsee; and in this respect the endorsement may be considered as general, and a *bonâ fide* holder may fill it up, by inserting above the express stipulation a direction to pay the contents to his order for value received." The case turned on another point. Blakely v. Grant, 6 Mass. R. 386.]

The words "*ne varietur*," written on a note by a notary public, in Louisiana, do not restrain its negotiability. (*u*)]

An (23) endorsement cannot be made for the transfer of less than the full sum appearing to be due upon the bill or note.

Sect. 2.—Where endorsement is necessary to make a transfer, an endorsement will convey no title, except against the person making it, unless it be made by him who has a right to make the transfer; a transfer by delivery may.

Therefore, in case of a loss by theft or accident, if the bill or note be assignable by mere delivery, the thief or finder may (24) confer a title by transferring it; if it be assignable by endorsement only, he (25) cannot

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[(*u*) Abat v. Gormley, 3 Miller, 238.]

(23) Hawkins v. Cardy, Ld. Raym. 360. Carth. 466. 12 Mod. 213. Salk. 65. In an action upon a bill drawn by the defendant for 46*l.* 19*s.* payable to Blackman or order, the declaration stated that Blackman endorsed 43*l.* 4*s.* of it to the plaintiff; the defendant pleaded an insufficient plea, upon which the plaintiff demurred; but the whole Court held the declaration bad, because the bill could not be endorsed for less than all the money due thereon, and the plaintiff discontinued his action. And per Gould J., in Johnson v. Kennion, 2 Wils. 262, "where the drawer of a bill has paid part, you may endorse it over for the residue; otherwise not, because it would subject him to a variety of actions."

[Action against the endorser of a note. By one endorsement he had assigned part of the sum mentioned in the note, and the residue by another endorsement. The Court held that the action could not be supported, on the ground that an endorsement for part of a note or bill is bad; and if so, these two vitious endorsements could never constitute a good one. Hughes v. Kiddell, 2 Bay, 324.

Douglass v. Wilkeson, 6 Wend. 637. Action against the defendant as endorser on a note made by Norton, and payable to the defendant for $2500, on which the defendant had endorsed, "Mr. Olcott, pay on the within seven hundred and fifty dollars, S. Wilkeson." Olcott was cashier of a bank at which the note was payable. It was held that the defendant was not liable as endorser on the note; and that he was not liable on the money counts for the $750, without other evidence of a consideration than the production of the note so endorsed, for the memorandum endorsed on the note, not having any payee, was not a bill of exchange.]

(24) Anon. Ld. Raym. 738. Salk. 126. 3 Salk. 71. B. lost a bank bill payable to A. or bearer; C. found it, and assigned it for a valuable consideration to D., who got a new bill for it from the bank. Trover was then brought against D. for the first bill; but by Holt C. J. "the action will not lie against *him*, because he took it for a valuable consideration,

If a bill or note transferable by delivery be lost, the loser should give immediate notice thereof to the drawee, or persons who are to pay it. (26)

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though it would against C., as he had no title; but payment to C. would have indemnified the bank."

Miller v. Race, Burr. 452. A bank note payable to William Fenney, or bearer, was stolen out of the mail in the night of the 11th December, 1756, and on the 12th came to the hands of the plaintiff for a full and valuable consideration, in the usual course of his business, and without any knowledge that it had been taken out of the mail; he afterwards presented it at the bank for payment, and the defendant, being one of the clerks, stopped it, upon which an action of trover was brought; and upon a case reserved upon the point, whether the plaintiff had a sufficient property in the note to entitle him to recover, the Court was clear in the opinion that he had, and that the action was well brought. Vide Lawson and others v. Weston and others, 4 Esp. N. P. C. 56.

Grant v. Vaughan, Burr. 1516. Vaughan gave Bicknell a draft upon his banker payable to "Ship Fortune, or bearer." Bicknell lost it, and the plaintiff afterwards took it, *bonâ fide*, in the course of trade, and paid a valuable consideration for it; the banker refused to pay it, upon which the plaintiff brought this action against Vaughan. Lord Mansfield left to the jury to consider, 1st, whether the plaintiff came to the possession of the bill fairly and bonâ fide; and 2dly, whether such draft was in fact and practice negotiable; and the jury found for the defendant: but upon an application for a new trial, and cause shown against it, the Court was clear that the second point ought not to have been left to the jury, because it was clear that such drafts were negotiable; and if the jury thought the plaintiff took the note fairly and bonâ fide, of which there appeared to be no doubt, he was entitled to recover. A new trial was accordingly granted, in which the plaintiff recovered the money. Peacock v. Rhodes, Dougl. 611. 633. ante, p. 104, note (12).

By 9 & 10 W. 3. c. 17. s. 3. "If any inland bill be lost, or miscarry within the time limited for its payment, the drawer shall, on security given upon request to indemnify him if such bill shall be found again, give another bill of the same tenor with the first." And it should seem that the equity of this statute would comprehend endorsements also, and that the 3 & 4 Anne, c. 9. (which gives the like remedies upon notes as were then in use on inland bills) would extend it to notes. See Walmsley v. Child, 1 Ves. Sen. 341.

See post, Chap. IX., in what cases an action may be maintained where a bill or note has been lost.

(25) In this case, however, it is advisable for the loser, in order to guard against the forgery of his endorsement, to give immediate notice of the loss to all the antecedent parties, and if payment has been made before such notice could be given, to apprise the payee thereof without delay.

(26) Lovell v. Martin, 4 Taunt. 799. Plaintiff lost a bill accepted payable at defendant's, and immediately gave notice thereof to the acceptor, and the acceptor communicated the notice to defendants with a request that they would not pay or discount the bill: they afterwards (probably from inadvertence) discounted it for one Powell, who had it from a child who picked it up: when due they wrote a receipt upon

And if such persons afterwards pay it to a person who has not taken it *bonâ fide*, or paid value for it, they will be responsible to the loser. (26)

The right to transfer a bill or note is in the payee, or in the person to whom it has been transferred from him.

And if a bill or note be deposited with a banker for a particular purpose, and be endorsed so as to give him the right to transfer it, and he (27) (28) negotiate, or (28) pledge it;

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it, and debited the acceptor with the amount. Plaintiff brought trover, and there being no proof that Powell took it bonâ fide or paid value, verdict for plaintiff. Rule nisi for nonsuit on the ground that plaintiff had not demanded the bill of defendants, and without such demand trover would not lie; but the Court held the writing a receipt upon it, and debiting the acceptor with the amount was a conversion: rule discharged.

(27) Bolton v. Puller, 1 Bos. and Pull. 539. Forbes and Gregory, traders in London, were also partners in the house of Caldwell and Co. in Liverpool. Bolton dealt with Caldwell and Co., and they prevailed upon the house in London to let him make his bills payable there. Bolton kept no account but with the house at Liverpool; and they kept the account with the house in London; and the payments on Bolton's bills, when made, were carried by the house in London to *their* account with the house in Liverpool; and by the house at Liverpool to their account with Bolton. In Feb. 1793, he accepted bills payable at the house in London, to the value of 19,702*l.*; and to enable the Liverpool house to provide for their payment, he endorsed to them (among other bills) a bill for 4000*l.* and another for 398*l.* These two bills they remitted generally, with many others, to Forbes and Gregory, to whom they were considerably indebted; but before the latter bill arrived, both houses became bankrupt. The acceptances were payable before the endorsed bills. Bolton was obliged to pay all his own acceptances; and the assignees of Forbes and Gregory having refused to deliver up these bills, he brought trover for them. A special verdict was found; and after two arguments, the Court were unanimously of opinion, that the assignees were entitled to keep the bills. They admitted, that as Forbes and Gregory were partners in the Liverpool house, they were to be considered as privy to the fact that the bills had been endorsed to that house to enable it to provide for Bolton's acceptances; but they held that the application which had been made of these bills, was the very thing which Bolton intended; and that therefore the privity of the London house in the agreement made between him and the house at Liverpool, could have no effect on the transaction, which, *as between the two houses, had undoubtedly changed the property in the bills:* that for the purpose of providing for Bolton's acceptances, the house at Liverpool was entitled to deal with the bills as it thought fit: that they had therefore a right to remit them to Forbes and Gregory; and as they were indebted to Forbes and Gregory in more than the amount, the assignees of Forbes and Gregory were entitled to keep them. Judgment for the defendants.

(28) Collins v. Martin, 1 Bos. and Pull. 648. The plaintiff sent bills,

such negotiation or pledging, although it may amount to a gross breach of trust and defeat the purpose for which the deposit was made, will, as between the person who made the deposit and an innocent holder of the bill or note, be binding upon the former.

[But it is held that if an agent pass notes belonging to his principal to a third person, as security for collateral liabilities for the agent previously entered into by the person to whom the notes are assigned, the latter cannot retain the notes or their proceeds against the principal. (*v*)]

An endorsement by a person of the same name with the

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endorsed in blank, to Messrs. Nightingales, to receive the money upon them: they borrowed money of the defendants, and pledged these bills as a security. They afterwards became bankrupt, and the plaintiff brought trover for the bills. There being no evidence that the defendants knew under what circumstances the bills had been left with Messrs. N., or how the plaintiff's account (he being in cash) stood with them, Eyre C. J. thought the action would not lie, and nonsuited the plaintiff. On a rule nisi to set aside the nonsuit, it was urged that though the Messrs. N. might have negotiated the bills, they could not pledge them; but after consideration, the Court was unanimous, that they had the power of binding the plaintiff as well by pledging as negotiating the bills, of which they were enabled to hold themselves out to the world as the absolute owners. Rule discharged.

[(*v*) Bay employed Randolph and Savage to sell a schooner for him, with orders to take good notes in payment, and transmit them to him. They sold the vessel and took endorsed negotiable notes from the purchasers. Before Bay could get possession of the notes, R. and S. became insolvent, and delivered these notes with others to J. J. and J. C. Coddington, without any request from them, to secure them for certain endorsements and responsibilities which they were then under for R. and S. No new credit was given to R. and S. in consequence of the delivery of the notes. Bay brought a bill in chancery against R. and S. and the Coddingtons, praying that they might be decreed to deliver up, and account to him for, the notes. The Coddingtons did not know that the notes were the property of Bay when they received them; and had disposed of them for cash before being informed of it. The Chancellor, Kent, decreed that the Coddingtons were not entitled to the notes or their proceeds as against Bay, who was the lawful owner of them when they were transferred to the Coddingtons; "inasmuch as they did not receive the notes in the course of business, nor in payment in whole or in part of any then existing debt, nor for cash or property advanced, or debt created, or responsibility incurred on the credit of the notes;" and decreed that they should pay the amount of the notes and interest to Bay. This decree was afterwards affirmed in the Court of Errors. Bay v. Coddington, 5 Johns. Ch. R. 54; Coddington v. Bay, 20 Johns. R. 637.]

person entitled to transfer it (29) will pass no right to the endorsee, though there be no particular description on the bill of note of the person entitled to transfer it.

But such endorsement, if made innocently, will bind the person making it, and the subsequent endorsers.

On a bill or note payable to A. for the use of B., the (30) right to transfer is in A.

On a bill or note payable to *several persons*, not in partnership, the right to transfer it is in all collectively, not (31) in any individually.

[Where a note is made payable to two persons, one of them may by his endorsement convey his interest in it to the other, so as to give the latter a right to sue on it in his own name alone. (*w*)

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(29) Mead v. Young, 4 Term Rep. 28. A bill payable to Henry Davis or order, was sent by the post, and got into the hands of a wrong Henry Davis, who endorsed it to the plaintiff: there was no description of Henry Davis in the bill, or addition to his name, nor was any fraud imputable to the plaintiff. This was an action against the acceptor, and on his offering evidence to show that the Henry Davis who endorsed the bill was not the person in whose favor it was drawn, Lord Kenyon was of opinion that the evidence was inadmissible, and he retained that opinion after cause shown against an application for a new trial; but Ashhurst, Buller, and Grose, Js. held, that unless the endorsement were made by the person to whom the bill was really payable, it was a forgery, and could confer no title, and that therefore it was competent for the defendant to show that the person who endorsed the bill was not the person in whose favor it was made, and a new trial was accordingly granted.

(30) Evans v. Cramlington, Carth. 5. 2 Vent. 307. Skinn. 264. A bill was payable "to Price or order, for the use of Calvert." Price endorsed it to Evans, after which an extent issued against Calvert, and the money due upon it was seized to the use of the King. These facts appearing upon the pleadings, two points were made upon demurrer: the one, whether Calvert had such an interest in the money as might be extended; and the other, whether Price had power to endorse the bill, or whether he had only a bare authority to receive the money for the use of Calvert: and the Court of King's Bench, and afterwards the Exchequer Chamber, held that Calvert had not such an interest as could be extended, and that Price had power to endorse the bill; and judgment was given for the plaintiff.

(31) See Carvick v. Vickery, ante, p. 49; [and Smith v. Whiting, ante, p. 50.

In Louisiana, where a bill or note is endorsed by several persons who are payees, each one is only answerable for his *virile* share, not each for the whole amount; but all must be made parties to a suit against them as endorsers. Barrow v. Norwood, 3 Miller, 437.]

[(*w*) Sneed v. Mitchell, 1 Hayw. N. C. R. 289.]

After the death of one partner, the surviving partner may transfer by endorsement a bill or note payable to the partnership. (*x*)

But after the dissolution of a copartnership, one partner cannot by his endorsement in the partnership name vest in the endorsee the title to a bill or note payable to the partnership. (*y*)

A partnership may by endorsement transfer the title to a bill or note to one partner; even where the partner claiming as endorsee of the partnership was the person who made the endorsement. (*z*)

A partnership may make a note payable to one partner, and an endorsement by him will vest a good title in the endorsee, who may sue the partnership upon the note. (*a*)

The directors of an incorporated bank, as usually constituted in the United States, may by their vote, without the corporate seal, or by their power of attorney, authorize their president or any other person to endorse a bill or note payable to the bank, and the endorsement by the person thus authorized will pass the property, in the bill or note. (*b*)

[(*x*) Jones v. Thorn, 14 Martin, 463.]

[(*y*) Sanford brought an action against Mickles and Foreman, as makers of a note payable to Brown and Olmstead. When the partnership of Brown and Olmstead was dissolved, Olmstead was authorized to take the stock, and collect debts and pay debts due from the company, but no authority was given him to endorse notes. He afterwards endorsed the note to Sanford, "Wm. Olmstead for the late firm of Brown and Olmstead." Yates J. delivered the opinion of the Court. "It would be a peculiar hardship to put a partner retired from the whole concern, so completely in the power of the other, as to charge him by negotiating bills given during the partnership. This power being denied, it follows that they must all join in the transfer of a bill negotiable after the dissolution, for the purpose of vesting the title in the endorsee." Sanford v. Mickles, 4 Johns. R. 224.]

[(*z*) Russell v. Swan, 16 Mass. R. 314; Kirby v. Cogswell, 1 Cain. R. 505.]

[(*a*) Smith v. Lusher, 5 Cowen, 688; Blake v. Wheadon, 2 Hayw. N. C. R. 109.]

[(*b*) See Spear v. Ladd, 11 Mass. R. 94; Fleckner v. U. S. Bank, 8 Wheat. 339.

The Directors of the Berkshire Bank authorized Larned, one of the directors, by a power of attorney signed by the president and three other directors, to assign any negotiable promissory notes belonging to the bank, to the attorney of the Northampton Bank. Larned endorsed his name as attorney upon a note made by Pepoon, payable to the

A cashier of such a bank has *primâ facie* authority to endorse on behalf of the bank, negotiable securities held by it. (*c*)]

If the right to transfer a bill or note be in a feme sole, and she marry, it (32) devolves upon her husband.

If a bill or note be made payable to a feme covert, the right to transfer it is in the husband; the wife cannot transfer unless as agent to him.

But if she do, and the husband promise to pay, it will be evidence (33) that she had authority from her husband to transfer.

[And if a wife, with the consent of her husband and in his presence, endorse with her own name a bill drawn by her and which is payable to her, it is sufficient to transfer the property in the bill to the endorsee. (*d*)]

If a bill be payable to an infant, an endorsement by him will

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Berkshire Bank, and the Northampton Bank sued Pepoon as maker of the note. Parker C. J. delivered the opinion of the Court. "We are satisfied that the directors might by their vote or power of attorney authorize the president or any other officer of the bank, to assign over the promissory notes payable to the company." And the Court decided that the plaintiffs might fill up the endorsement so as to give effect to it. Northampton Bank v. Pepoon, 11 Mass. R. 288.]

[(*c*) Wild v. Bank of Passamaquoddy, 3 Mason, 505.

It was held in a case in Louisiana, that a resolution of a bank authorizing the president and cashier to liquidate the balance due to another bank, did not authorize the cashier alone to endorse a note to the other bank. The endorsement of both president and cashier was necessary, if the resolution authorized such a transfer by them. United States Bank v. Fleckner, 8 Martin, 309.]

(32) Connor v. Martin, Str. 516, cited 3 Wils. 5. A bill was made payable to Susan Connor, or order, while she was sole. She married, and during her coverture endorsed it to the plaintiff; and upon demurrer and argument, the Court of Common Pleas held, that the feme covert could not assign the note, because by the marriage it became the sole right and property of the husband; and by Parker C. J. in Miles v. Williams, 10 Mod. 246, "if a note be payable to a feme sole or order, and she marries, her husband is the proper person to endorse it."

M'Neilage v. Holloway, 1 Barnw. & Ald. 218. A bill was payable to a feme sole or order; she married before it became due; her husband brought an action upon it in his own name; and on a rule to show cause why the judgment should not be arrested on the ground that the wife should have joined in the action, the Court held that as this was a negotiable security, the marriage transferred the property to the husband, and entitled him, if he thought fit, to sue alone.

(33) See Cotes v. Davis, ante, p. 41.

[(*d*) Prestwick v. Marshall, 5 M. & P. 513; S. C. 7 Bing. 565.]

convey (34) no interest, as against himself; but if he draw the bill, it may against the acceptor. (34)

If the person who has the right to transfer a bill or note die, it (35) devolves upon his personal representative; if he become bankrupt, and he holds the bill or note in his own right, it devolves upon his assignees.

If the person who has right to transfer, deliver over a bill or note for a valuable consideration, and forget to endorse it, and die, his executor or administrator may endorse it. (36)

And it will be no objection to an endorsement by an administrator, that he took out administration for the very purpose of making the endorsement. (36)

Or that the endorsement was to himself and his partners. (36)

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(34) See Taylor v. Croker, 4 Esp. N. P. C. 187, post.

(35) Rawlinson v. Stone, 3 Wils. 1. Str. 1260. 2 Barnes, 137. A note was payable to A. B. or order. A. B. died intestate, and his administrator endorsed it to the plaintiff. These facts appearing upon the declaration, the defendant demurred, and contended that the personal representative of the payee had no power to endorse a note; but the Court of Common Pleas after three arguments, and the Court of King's Bench upon error brought, were unanimously of opinion that he had; and each court said, it was every day's practice, and the constant usage, for executors and administrators to endorse bills and notes payable to the order of their testators or intestates.

(36) Watkins v. Maule, 3 Jac. & W. 237. Sir Rt. Salusbury remitted to Down and Co. a note for 2000*l*., drawn by Hall, payable to Sir R. S. or order, but not endorsed by him: Down and Co. gave Sir R. credit for the amount, and he drew it out from the house: the note was paid when due; but, on an explanation from Hall, that Sir R. had assured him he should not be called upon for payment, unless there should be a deficiency on the sale of Sir R.'s estates, Down and Co. returned him the money, and took back the note: Sir R. became bankrupt, and his estates proving insufficient, Down and Co. sued Hall, but Hall agreed to give bond for the amount, paid the costs, and the proceedings were stayed: before the bond was given, Hall died; Sir R. died also, and Down and Co., having petitioned to be admitted creditors upon Hall's estate, and their claim being rejected, it was then for the first time discovered that Sir R. had not endorsed the note: Down thereupon took out administration to Sir R., and endorsed the note to himself and partners. The Master persisting in rejecting the claim, Down and Co. petitioned for leave to file exceptions to the Master's report. Plumer M. R. thought it clear that, if the facts were as stated, the endorsement was valid, and the claim good; but, there being some dispute as to the facts, he referred it back to the Master that he might review his report.

[But an executor or administrator can only maintain an action on a bill or note within the limits of the State or government from which he derives his jurisdiction; and if he endorses it to another person, it will convey no authority to the endorsee to bring a suit on it in another State. (*e*)]

If the person who should have endorsed become bankrupt, he may nevertheless make the endorsement. (37)

Or his assignees may be compelled to make it. (38)

At least if the person requiring it would otherwise be a creditor to the amount. (38)

But the endorsement must be so framed, as not to make the assignees personally liable. (38)

If the right to a bill or note be in several partners, and some of them become bankrupt, and afterwards endorse it, such endorsement, though made to a creditor of the partnership, will confer (39) no title on the endorsee.

And if the creditor receive the money due upon the bill or note, the solvent partners, together with the assignees of the bankrupts, (39) may recover back the money so received.

[(*e*) Stearns v. Burnham, 5 Greenl. 261; Thompson v. Wilson, 2 N. H. R. 291.]

(37) Smith and another v. Pickering, Peake, N. P. C. 50. Richardson and Hill drew a bill on the defendant, payable to their own order, which the defendant accepted. The drawers delivered this bill to the plaintiffs for a valuable consideration, but forgot to endorse it. They afterwards became bankrupts, and then endorsed it. The plaintiffs, as endorsees, sued the defendant as acceptor. Lord Kenyon was clearly of opinion that the endorsement was good, and the plaintiffs had a verdict.

[See also Baker v. Arnold, 3 Cain. R. 279, an action by an endorsee, in which Livingston J. expressed his opinion that where a note had been delivered before it became due, the endorsement, even if made after it became due, should be regarded as relating back to the time of its actual delivery to the endorsee. See also White v. Kibling, 11 Johns. R. 128, in which the same question is raised by the counsel, though the Court expresses no opinion upon it.]

(38) Ex parte Mowbray, 1 Jac. & Walk. 428. Everest, who afterwards became bankrupt, having transferred a bill to Mowbray for valuable consideration, but without endorsing it, though he was payee, Mowbray petitioned that the assignees might be ordered to endorse it; otherwise, he claimed to be a creditor for the amount. The assignees opposed it. Lord Eldon said, the difficulty was to frame an order for a special endorsement, that would prevent the assignees from being personally liable: if a special endorsement were made, with which Mowbray would be content, he felt no difficulty in making the order.

(39) Thomason and others v. Frere and others, 10 East's Rep. 418.

But if a man hold a bill or note, not in his own right, but as a trustee, his bankruptcy will not pass the right to transfer to his assignees. (40)

And if partners hold a bill or note, as trustees, the bankruptcy of one of them will not preclude him and the others from transferring it. (40)

If the consideration upon which bills are given fail, and the person to whom they are given have them in his hands, and become bankrupt, they belong, not to the assignees, but to the person who gave them, and shall be restored to him. (41)

Thomason, Underhill, and Guest, were partners in trade at Birmingham; and being debtors to the defendants to the amount of 1800*l.*, and creditors upon Gamble and Co. for 1450*l.*, Underhill and Guest, on the 11th October, 1807, without the consent or knowledge of Thomason (who was abroad), endorsed to the defendants a bill drawn by the firm of Thomason, Underhill, and Guest, upon, and accepted by, the agents of Gamble and Co. for this 1450*l.* Underhill and Guest had, on the 7th October, 1807, committed acts of bankruptcy, upon which separate commissions issued on the 19th. The bill for 1450*l.* became due on the 6th December, and was then paid: and to recover this money, the present action was brought by Thomason and the assignees of Underhill and Guest. The house of Thomason, Underhill, and Guest, was still indebted to the defendants beyond the amount of the sum now sought to be recovered.—The plaintiffs were nonsuited. But on a rule nisi for a new trial, the Court (Lord Ellenborough C. J. absente) held that the endorsement, having been made after an act of bankruptcy, though before the issuing of the commission and for the purpose of paying a partnership debt, was invalid; and they inclined to think that this action being brought to recover the money received on the bill, which had been thus wrongfully endorsed, the defendants had no right to set off their demand upon the firm against this claim by Thomason and the assignees. Rule absolute.

(40) Ramsbottom and others v. Cator, 1 Stark. 228. J. and M. Hervey were partners as bankers; defendant delivered them a bill that they might get it discounted; they passed it to plaintiffs, their bankers; but before they did so, J. H. committed an act of bankruptcy, upon which a commission afterwards issued: it was urged for defendant that the bankruptcy of J. H. destroyed his and his partner's right to pass away the bill; but Lord Ellenborough held, that as the Herveys held it upon a special trust, to get it discounted, and not in their own right, no interest in it passed to the assignees of J. H.; and though he doubted whether plaintiffs had an interest beyond what the Herveys had, he allowed them to take a verdict, and gave the defendant leave to take the opinion of the Court upon the point.—But the defendant did not move it.

(41) Ex parte M'Gae, in re Wood, 1816. 2 Rose 376. 19 Ves. 607, There was a bargain between Wood & Co., bankers at Workington, and M'Gae, that M'Gae should have their notes for any short bills he should pay into their bank: 23d July, he took by anticipation 105*l.* in

So the right to endorse will not devolve upon a bankrupt's assignees, if (42) neither he nor they would have any right to demand payment.

Therefore, if a bankrupt draw a bill payable to his own order, having at the time (42) no effects in the hands of the drawee; or if, having effects, he draw it for a sum (43) ex-

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their notes, and 24th paid in two bills for 75*l.* and 70*l.* Commissions of bankruptcy had issued against three members of the Workington bank 22d July, and on 4th August, one issued against the remaining partner. The separate commissions were superseded in favor of a joint one, and M'Gae petitioned to have the two bills returned, he returning the notes; and on hearing, Lord Eldon C. ordered it. M'Gae's bargain was to have the notes of the house whilst it was going on as a house, and nothing had occurred to put an end to it; these he has not got, and the consideration for which he gave the bills has failed.

(42) Arden v. Watkins, 3 East's Rep. 317. On the 5th of October, 1801, Lewis Jones committed an act of bankruptcy, on which a commission issued on the 31st December, 1801. On the 4th of December, 1801, he drew a bill on Watkins for 100*l.* payable to his own order, and endorsed it to the plaintiff, who paid him the full value. Watkins owed Jones nothing, but accepted the bill to enable him to raise money upon it, and Jones deposited a lease with him as an indemnity: the assignees insisted upon a restoration of the lease, and Watkins refused to pay the bill. Action on the bill and reference. The arbitrator awarded against Watkins, but stated the facts specially, to enable him to take the opinion of the Court. After a rule nisi to set aside the award, cause shown, and time taken to consider, the Court was clear that the defendant was liable: that as Jones had no effects in Watkins's hand, no right to endorse nor any claim upon the bill devolved on his assignees; and that therefore his endorsement was effectual, and transferred the property to the plaintiff. Rule discharged.

(43) Willis v. Freeman and another, 12 East's Rep. 656. In an action by the endorsee of a bill against the acceptors, a verdict was found for the plaintiff, subject to the opinion of the Court upon a case. The case stated that Anderson, the drawer, being indebted to the plaintiff in more than 2000*l.*, and being insolvent, proposed to pay the plaintiff a composition of 13*s.* 6*d.* in the pound, together with the costs of an action which had been brought by the plaintiff against him, by a bill upon the defendants. This proposal being acceded to, Anderson applied to the defendants to accept a bill for 1400*l.* *for his accommodation.* The defendants accepted the bill, drawn on the 5th of July, and payable on the 10th of November, 1809, having in their hands effects of Anderson's to the amount of 888*l.* 16*s.* 8*d.* Anderson had committed a secret act of bankruptcy on the 7th of March, 1809, upon which a commission issued on the 25th of July. The Court of King's Bench held, that to the extent of 888*l.* 16*s.* 8*d.* the defendants had a right to resist payment on the ground of their being answerable for that amount to the assignees, to whom these funds devolved upon the act of bankruptcy; and that therefore the endorsement by Anderson to that extent was inoperative: but as to the surplus (511*l.* 3*s.* 8*d.*) for which the

ceeding their amount, and the bill be accepted for his accommodation; his endorsement will, in the former case, confer a good title as to the whole sum mentioned in the bill; and in the latter, as to such sum as is not covered by the effects. Because, in the one case the assignees have no claim, in the other they have none beyond the amount of the effects.

So, if a trader get a bill by fraud, and become bankrupt, the bill will belong, not to his assignees, (44) but to the person from whom he obtained it; at least if he promised, before he became bankrupt, to return it.

So, if a banker who has a lien on a bill or note for his general balance, deliver it to his customer when it is due, that he may obtain payment, and the customer become bankrupt, the bill or note will nevertheless belong, not to the assignees, but to the banker. (45)

Where an agent becomes bankrupt, bills remitted to him by his principal for a particular purpose, (*e. g.* to pay an accept-

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acceptance was accommodation, the case of Arden v. Watkins was in point to show that the endorsement was valid. And they held that the law in this respect had not been altered by the 49th Geo. 3. c. 121. s. 8. They therefore ordered the verdict to be entered for this reduced sum of 511*l.* 3*s.* 4*d.*

(44) Gladstone v. Hadwen, 1 M. & S. 517. Sill and Co. got bills from Hadwen under color of giving him a security upon some coffee, to which however they had no title; on being pressed by Hadwen, they promised to return him the bills, which were on their way from London to Liverpool; but before they arrived, Sill and Co. committed acts of bankruptcy, upon which a commission afterwards issued: when the bills arrived, they were delivered to Hadwen, upon which Sill and Co.'s assignees brought trover; but on case and time to consider, the Court held that they could not sue for what a court of equity would not have allowed them to keep; and that as Hadwen would never have parted with the bills but for a false pretence and fraud, a court of equity would have compelled the assignees, who claimed under Sill and Co., had they got the bills, to deliver them up to Hadwen.

(45) Bruce v. Hurley, 1 Stark. 23. Young and Co., Bankers at Taunton, sent to plaintiffs, their town bankers, a note of defendant's at two months after date. The day before it became due plaintiffs sent it to Young and Co. at Taunton, that they might obtain payment from defendant; defendant did not pay it, and whilst the bill was in their hands, Young and Co. became bankrupts. Young and Co. had overdrawn plaintiffs, and plaintiffs sued defendant on this note; and as plaintiffs only sent the note to Young and Co. that they might obtain payment for plaintiffs and act as their agents in that respect, Lord Ellenborough held plaintiffs entitled to recover, and they had a verdict accordingly.

ance of the agent on account of the principal (46),) and not for the general purposes of the agent, belong, whilst remaining in the agent's hands, not to the assignees, but to the principal.

And the produce of bills remitted to an agent for a particular purpose may, under circumstances, if clearly identified and distinguishable from the bulk of the agent's property, belong to the principal, not to the assignees. (47)

Where a banker or other agent becomes bankrupt, bills paid in by his customers, remaining in his hands, will, subject to

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(46) Ex parte Dumas, 1 Atk. 232. 2 Ves. sen. 582. Dumas and Co. in Paris, drew certain bills upon Jullian and Co., of London, and transmitted to Jullian and Co. certain undue bills, to reimburse Jullian and Co. what they should advance to pay the bills so drawn them: Jullian and Co. applied to their own use some of the bills transmitted, but others of them remained in their hands: they became bankrupts, not having paid any of the bills drawn on them: Dumas and Co. therefore paid them, and then petitioned to have restored to them such of the bills transmitted by them to Jullian and Co. as remained in the hands of the assignees. Lord Hardwicke thought, that as such bills had been remitted to be applied to a particular purpose, they remained, whilst unapplied, the property of Dumas and Co., and he ordered their restoration accordingly.

S. P. ex parte Oursell, Ambl. 297.

Ex parte Smith, 1 Buck. 355. Smith, of Hamburg, was in the habit of drawing upon Power and Co., merchants in London, and of remitting bills to them to meet his drafts: he drew upon them for 1000*l.*, and before that bill became due remitted them bills for 1023*l.*, and directed them to do the needful with the proceeds, which they said they would: it was clear the bills for 1023*l.* were remitted for the purpose of furnishing funds for the 1000*l.* Power and Co. having become bankrupt before the bills remitted were due, Smith took up the bill for 1000*l.*, and petitioned to have the other bills for 1023*l.*, or their proceeds, delivered up to him. Upon hearing, Leach V. C. thought it clear he was entitled to them, and ordered accordingly.

(47) Ex parte Sayers, 5 Ves. 169. Sayers in Dominica commissioned A. of London to buy him foreign coin, and remitted 16,000*l.* in bills. A. discounted the bills, and sent out 14,000*l.*, part of the proceeds, to Lisbon, to have the purchases made there, if practicable; if not, to have the money returned in bills; and he apprised Sayers of what he had done: the purchases were not made, but bills were remitted; and A. having become bankrupt, question, whether these bills belonged to the assignees or to Sayers: after argument, Lord Loughborough C. held they belonged to Sayers; though the produce of the bills for 16,000*l.* might for the time have become mixed with the general property of A., the remittance of the 14,000*l.* gave it an identity and distinction from the bulk of A.'s property; the coin, if purchased, would have been the property of Sayers, and the bills which were sent in lieu of the coin were therefore his; and he ordered accordingly.

See Anon. cit. p. Ld. Hardw. 1 Atk. 234.

the banker's lien thereon, belong, primâ facie, not to the assignees but to the respective customers; (48)

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(48) Zinck v. Walker, Bl. 1154. Zinck employed Jenner as his London banker, and drew on him under an agreement to make remittances to answer the bills when due: Jenner became bankrupt, being a creditor of Zinck for 195*l.*, and under acceptances for him to the amount of 1022*l.*, but he had in his possession two bills which Zinck had remitted him for 450*l.*: the assignees received the money upon these bills: and Zinck, having paid the bills for 1022*l.*, called upon them for the balance of the 450*l.*, after deducting thereout the 195*l.*: the assignees refused to pay it; but, upon action and case, the Court thought the bills were to be considered as remitted for a particular purpose, viz. to pay the balance and discharge the acceptances, and that, subject thereto, they were the property of Zinck.

Giles v. Perkins, 9 East, 12. Plaintiffs on the 12th of November paid into the bank of D. and Co., at Birmingham, three bills due in December and January following, and endorsed by plaintiffs: 18th November D. and Co. became bankrupt, being considerably indebted to plaintiffs on their cash and bill account, independent of those bills: it was stated as the practice of this bank to enter the undue bills brought by customers, if approved, as cash to the credit of the customer, giving him cash, or liberty to draw to their amount; and the bankers, as convenience required, paid them away in the course of business, or sent them to their correspondents in London: interest was charged on both sides of the account, and, if the interest account were against the customer, the bankers charged a commission. The assignees refused to deliver up these three bills, and received payment of them when due: action for money had and received, and Ld. Ellenborough was of opinion in favor of plaintiffs, who obtained a verdict; a rule nisi for new trial was refused; and, per Ld. Ellenborough, "every man who pays a bill not due into the hands of a banker, places it there as in the hands of an agent, to obtain payment of it when due: if the banker discount the bill, or advance money on the credit of it, that alters the case; in the one case he obtains the entire property in the bill; in the other he has a lien on it pro tanto; but he can have no lien upon it till his account is overdrawn."

Ex parte Rowton, 1 Rose 15. Brickwood and Co., bankers in London, became bankrupt: they were acceptors for the Chester bank to the amount of 26,070*l.*, and had in their hands, belonging to the Chester bank, 25,272*l.*, and short bills to the amount of 20,501*l.* The Chester bank petitioned, that upon payment by them to the assignees of the difference between the 26,070*l.* and the 25,272*l.* (the acceptances by the bankrupts and the cash balance), so as to cover the whole amount of the acceptances, the assignees should deliver to them the short bills; Ld. Eldon ordered accordingly.

Ex parte Sargeant, 1 Rose, 153. (1810). Burrough, a banker at Salisbury, became bankrupt: Sargeant banked with him, and was in the habit of paying in cash and bills, which were entered, without distinction, in a general account. Before Burrough failed, Sargeant paid in two bills, which did not become due until after Burrough's bankruptcy: Burrough had remitted them to Kensington and Co., his town bankers, and they were in Kensington and Co.'s hands when Burrough failed: Kensington and Co. were not in advance for Burrough, and

had no claim on these bills, but they refused to deliver them to Sargeant, and received the amount, which they paid to the assignees: Sargeant petitioned, that the assignees might pay the proceeds to him; and, upon argument, Ld. Eldon C. was clear he was entitled to them; unless it were the bargain between Sargeant and Burrough, or from the habits of dealing between them it could be inferred that it was understood between them, that bills paid in before they were due were to be considered immediately as cash: and he declared him entitled, unless by his consent, or the habit of dealing between the parties, the bills were to be considered as cash.

Ex parte the Hull, Wakefield, and other country banks, in the matter of Boldero, 19 Ves. 25. 1 Rose, 232. Boldero and Co. were the London bankers to the country banks of Pease and Co. of Hull, Townend and Co. of Wakefield, Farley and Co. of York, Daniel and Co. of Yeovil, and Banks and Co. of Leeds and Thirsk. They became bankrupt, having in their hands bills remitted from each of these houses; and the question upon petition was, whether such bills continued the property of the respective houses or belonged to the assignees. The half-yearly accounts in all the cases contained the *cash* receipts and payments, and interest thereon, and an account of the bills remitted; but those bills were not carried to the cash account till the money upon them was received: in the case of the Hull bank the accounts transmitted to them described the undue bills as "the property of Pease and Co.," and in the case of the Wakefield bank, Boldero and Co., in acknowledging the receipt of some of the latest remittances, used the expression, "which we hold in reserve at your disposal." The Wakefield bank had, in some instances, directed discounts to diminish the cash balance when overdrawn, and in one instance they adopted a previous discount to the extent of 5000*l*. Boldero and Co. had also discounted some of the Wakefield bills for their own purposes, but they concealed that fact in the accounts they rendered. The Wakefield bank made Boldero and Co. an allowance, which came to 700*l*. per annum: all the other banks, except the Hull, had occasionally permitted the discount of bills they had remitted. After time to consider, Lord Eldon C. treated each case separately, and held, that the bills in each belonged to the house by which they had been remitted. In the Hull bank case he noticed the express declaration that the bills belonged to that house: in the Wakefield case, the expressions used in acknowledging the remittances; the permissions to discount, which would have been unnecessary had Boldero and Co. had the right to discount; and the concealment of a discount, as if they considered it a breach of trust. In the York case he noticed an instance of a permission to discount to the amount of 7000*l*., if necessary; and in the Leeds and Thirsk case, he observed, upon the permission to discount and negotiate for limited purposes, that that gave no power beyond, but implied that the general right, subject only to that permission, was in the country bank; the power was to discount for the purposes not of the London but of the country bank.

Ex parte Twogood (Aug. 1812.) 19 Ves. 229. Crossley bargained with Messrs. Lee that he should deposit with them bills at long dates, which they might receive when due or dispose of in their business, as they should think fit, and that they should accept Crossley's bills at three months. In 1807 Crossley became bankrupt; at that time he owed the Lees 8007*l*., and they had in their possession bills they had received from him to the amount of 7999*l*.; and whether the sums they afterwards received on the bills should be deducted from the

proof they had made of the 8007*l.* was the question. Crossley's endorsement was upon each bill. Lord Eldon C. held that their right depended upon the terms on which they took the bills: if they took them as mere agents for Crossley, to apply the produce to his use and not otherwise, the deduction ought to be made; but if they took them as ordinary endorsees, to apply the produce, if they thought fit, to their own purposes, it was otherwise: he decided that they took as ordinary endorsees, and dismissed the petition.

Ex parte Buchanan, re Kensington (Aug. 1812.); 1 Rose, 280. Kensington and Co. were the London bankers of the Glasgow bank, and upon the bankruptcy of the former the Glasgow bank petitioned to have certain short bills which were in the hands of Kensington and Co. delivered up; the Glasgow bank undertaking to leave with Kensington and Co.'s estate bills sufficient to meet the acceptances upon which it was liable on the petitioners' account. Lord Eldon C. said, the petitioners must give security that the bills they left should be paid when due, and made the order.

Ex parte Harford, 2 Rose, 162. (Mich. 1814). Whitehead and Co., London bankers, having become bankrupt, their country correspondents petitioned to have their short bills delivered up, they indemnifying the bankrupts' estate against its liability for the petitioners: and the right was considered so indisputable, that two orders were made by consent; one, in ex parte Harford, that the provisional assignee should retain the cash balance and cash received on the short bills paid, together with a sufficient number of the other short bills to cover Whitehead and Co.'s acceptances, and that he should deliver over to Harford and Co. the residue of the short bills, notes, and securities; the cash and notes retained to be given up, as Harford and Co. produced the acceptances cancelled: the other order was, "The provisional assignee consents that all the bills, &c. shall be delivered up, upon the petitioner leaving such sum as, together with the cash balance, equals the acceptances outstanding."

Ex parte Armitstead, 2 Glyn. & Ja. 371. In March, 1822, A. began to keep cash with the Lancaster bank, and he paid in, from time to time, short bills: these bills were always, on the day they were paid in, entered as cash both in his pass-book and in the books of the bank; but it did not appear that he ever drew against them until they became due; nor that he ever exhausted what, independently of these bills, was his cash balance. In December, 1825, he paid in two bills not then due: the Lancaster bank immediately endorsed them to Barclay and Co., their London bankers, and before they became due became bankrupt. Barclay and Co. received the amount; but Barclay and Co. having security from the Lancaster house to the amount of more than the money the Lancaster house owed them, A. petitioned to come in on that security; upon the principle that, as between him and the Lancaster bank, the bills belonged to him, and therefore it was by his money that the claim of Barclay and Co. upon such security was pro tanto diminished. Lord Lyndhurst C., after time to consider, thought the bills continued his, and granted the petition.

[See also ex parte Benson, 1 Deac. & Chit. Bank. Cas. 435.]

Thompson v. Giles, Mason v. Giles, 2 Barn. & Cr. 422. Plaintiffs banked with Worswick and Co. of Lancaster: Worswick and Co. entered all the bills plaintiffs paid in, if Worswick and Co. approved of them, on the credit side of plaintiffs' account, and carried the amount into the cash column thus, "December 10. Bills 680*l.*:" plaintiffs either endorsed them, or, if they did not like their names to appear, guaran-

Whether the customers were common individuals (49), or country bankers; (50)

And whether the banker were paid for his agency (51) or not.

But there may be such a course of dealing between the banker and his customer as to show, that the bills are considered by both parties to belong not to the customer, but to the banker (52): it is, however, for the assignees to prove such a course of dealing;—the presumption is the other way.

The accounts from time to time rendered to the customer are evidence to show the course of dealing between the parties. (53)

Entries in the banker's books are not; unless it appear that the customer had full knowledge of what the books contain. (54)

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tied the payment of them to Worswick and Co., and Worswick and Co. kept an interest account, in which plaintiffs were debited with the interest until the bills should become due. Worswick and Co. and the other bankers in the neighborhood, used to pass into circulation many of the bills their customers paid in, and in one case plaintiffs knew it. Worswick and Co. became bankrupt, having bills in their hands, paid in by Thompson and Co. to the amount of 25,000*l*., and by Mason and Co. to the amount of 1483*l*., and the assignees insisted on having these bills. Thompson and Co., and Mason and Co. brought trover; and on a case reserved, the assignees insisted that the course of dealing between Worswick and Co. and plaintiffs, evinced by the entries in Worswick and Co.'s books, and the usage, proved that the bargain between plaintiffs and Worswick and Co. was, that the bills should, as soon as paid in, become the property of Worswick and Co., and that the plaintiffs should at the same time be creditors pro tanto in cash: but the Court held clearly, that the facts warranted no such inference; that a bargain to such an effect would be so prejudicial to the customer that no banker could reasonably propose, nor any customer reasonably accede to it; and that the loss, in case of theft or fire, would have been shifted in a way that never could have been intended; that the fair inference, from the mode of keeping the accounts, was no more than this, that it was intended to show the customer how far the bank entitled him to draw, and to justify the banker in using the bills paid in, not for his own purposes, but for the purposes of the customer.—Postea to the plaintiffs.

(49) Zinck v. Walker, Giles v. Perkins, Ex parte Sargeant, Ex parte Twogood, Ex parte Armitstead, Thompson v. Giles, supra.

(50) Ex parte Rowton, Ex parte the Hull, Wakefield, and other banks, re Boldero, Ex parte Buchannan, Ex parte Harford, supra.

(51) Ex parte the Wakefield Bank, re Boldero, supra.

(52) Ex parte Sargeant, ante p. 124.

(53) Ex parte the country Banks, re Boldero, supra.

(54) 1 Rose, 252.

But such entries, though never communicated to the customer, are evidence against the banker (54); and so are declarations made by him before he became bankrupt. (55)

If it be the course of dealing that the bills, as soon as they are paid in, are to become the property of the banker; that he has a right to apply them to his own purposes; that in case of loss he is to be the sufferer; and that they are to be treated between the parties as cash; they belong to the assignees.

But, if it be the course of dealing that they are to continue the property of the customer whilst they are in the banker's hands; that they are to be applicable to the purposes of the customer only; that the customer would have a right to complain if the banker used them for himself; and that in case of loss it would fall not upon the banker but upon him; they belong to the customer.

Applications by the customer to the banker not to put into circulation particular bills are evidence that the property is in the banker (56); because, otherwise, it would be a breach of duty to put them into circulation.

Applications by the banker for leave to use particular bills for his own purposes raise a contrary presumption; for, why should leave be asked for what a man has a right to do without leave?

Entering the bills as soon as they are received as cash with a deduction for the interest, for the time they have to run, is a circumstance to show they are immediately considered

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(55) Ex parte the Hull Bank, re Boldero, suprà.

(56) Ex parte Thompson, 1 Mont. & M'A., 102: in March, 1822, Thompson began to deal with the Lancaster Bank. He scarcely ever paid in any thing but short bills: they were entered in the bank and pass books as cash, deducting interest till they became due: he was in the constant habit of drawing against them as cash, and in some instances had requested that particular bills might not be put in circulation, because it would show who his correspondents were: the bills he had paid in being in the hands of Barclay and Co. when the Lancaster Bank failed, he petitioned as Armitstead had done (ex parte Armitstead, antè, p. 126): but Shadwell V. C. at the hearing thought it clear, from the course of dealing and the directions not to circulate particular bills, that there was a mutual understanding that the short bills were at once to be treated as cash, and that they, therefore, became the property of the Lancaster Bank as soon as they were paid in: the petition was dismissed with costs.

as the property of the banker (57); but it is not conclusive. (58)

Entering them without a deduction of discount is a circumstance to show the contrary (59); especially if they be entered, not as cash, bu t a bills. (59)

The customer's endorsing them, where his endorsement is not necessary to enable the banker to get them paid, is a circumstance tending to show that they become the property of the banker as soon as they are remitted (60); but it is not conclusive. (60)

Where a customer never draws against short bills, it may be considered he does not look upon them as cash: where he is in the constant habit of doing so (61), the contrary is to be inferred.

If a customer who has a drawing account with a banker deposit with him undue bills to indemnify the banker against his acceptances, the holders of the bills so drawn and accepted have no right to have such undue bills applied in payment of the bills they hold; yet, if both the customer and banker become bankrupt, and the state of accounts between them be such that the banker is entitled to look to the undue bills to indemnify him against all or any part of his acceptances, the produce of such undue bills will be applied in payment of the banker's acceptances to the extent to which the banker is entitled to be so indemnified (62): but no further. (63)

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(57) See 2 Barn. & Cr. 433. per Holroyd J.
(58) Ex parte Sargeant, antè, p. 124.
(59) Thompson v. Giles, antè, 126.
(60) Ex parte Twogood, antè, 125.
(61) Ex parte Thompson, antè, 128.
(62) Ex parte Waring, 2 Rose, 182. 19 Ves. 345. (August, 1814; April, 1815). Bracken and Co. drew upon Brickwood and Co., and remitted to them cash and bills to cover their liability: 7th July, 1810, Brickwood and Co. became bankrupt, being under acceptances for Bracken and Co. to the amount of 24,000*l.*, and having cash of theirs 6,766*l.*, and in short bills 21,643*l.* Bracken and Co. became bankrupt in August, 1810, and their assignees obtained an order that Brickwood's assignees should keep distinct accounts of the general estate of Brickwood and Co., and of the proceeds of the short bills, and that they should pay to Bracken's assignees the surplus of those proceeds, after paying the dividends to the holders of the bills drawn by Bracken and Co., and accepted by Brickwood and Co. The holders of those bills

Thus, if the banker be under acceptances for the drawer to the extent of 20,000*l.*, and have undue bills of the customer's to that amount, but be indebted to the customer 10,000*l.*, the undue bills will be applied to those acceptances to the extent of 10,000*l.* only ; because the banker would have no claim upon them except to that amount.

[Where a banker has permission to discount bills remitted by a customer to such an amount only as shall be necessary to meet the bills, notes, and acceptances of the customer which are in course of immediate payment, and the customer remits a bill to the banker to meet certain acceptances of the customer which were about becoming due; if the banker does not pay these acceptances, the property in the bill remitted remains in the customer. And if the banker, after having neglected to pay the acceptances, makes an entry in his books of having discounted the bill remitted, it will still continue the property of the customer, who can recover it of the banker's assignees if he becomes bankrupt. (*f*)

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presented a counter-petition, that the proceeds of the short bills should be applied to their demands, on the ground that they were deposited specifically to pay those demands. Lord Eldon C. thought it clear that the holders were not entitled to what they asked on the ground on which they asked it, viz. that Brickwood and Co. held the short bills in trust for them; but, it being in his mind clear, that Bracken and Co. would have been entitled to a restoration of the short bills upon relieving Brickwood and Co. from their acceptances, though not otherwise, the true way of arranging the equities between the two estates was, to appropriate the short bills to the payment of those acceptances: the holders of those acceptances obtaining this preference, not upon the principle of a direct demand, nor upon the principle of right in them, but because it was the proper mode of doing justice between the two estates.

(63) Ex parte Parr, Buck, 191. (12 March, 1818). Leigh had a drawing account with Brickwood and Co.; Brickwood and Co., at the time of their bankruptcy in 1810, were under acceptances for Leigh to the amount of 20,784*l.*, and had short bills of Leigh's in their hands: in 1811, Leigh became bankrupt. Parr, who held the bills for 20,784*l.*, petitioned to have the short bills applied to his demand; this was opposed, on the ground that Brickwood & Co. were indebted to Leigh, exclusively of the short bills, in 21,212*l.*, and, therefore, had no claim upon those bills, and there was no equity to be arranged between the two estates: Plumer V. C. was of that opinion; but, it being doubtful whether Brickwood and Co. were indebted to Leigh in the 21,212*l.*, he referred it to the master to inquire, whether Brickwood and Co. had, at the time of their bankruptcy, any and what lien upon the short bills.

[(*f*) Ex parte Frere in re Sikes & Co. 1 Mont. & Mac. 263.]

Where A., the holder of a bill or note, endorses it in blank and sends it for collection to B., who also endorses it and sends it to C. for collection, without informing him who is the owner, and C. receives the money upon it; C. is bound to account for this money to A., and cannot apply it to the payment of his own claims against B. unless C. has paid money to B. or given him some new credit, in consequence of having the note, before receiving notice of A.'s interest in it. (*g*)]

Where a bill or note is made payable to a person who is merely an agent in the transaction, if he endorse generally, without using words to prevent his liability, he will be bound personally. (64)

[An authority to endorse a note need not be in writing. A

[(*g*) Lawrence v. Stonington Bank, 6 Conn. R. 521. The plaintiffs, on Sept. 2, 1825, residing in the city of New York, drew a bill payable to their own order in twenty days, on Denison, at Stonington, in Connecticut, endorsed it in blank, and lodged it in the Phœnix Bank of New York for collection. The cashier of this bank endorsed it in blank and sent it to the Eagle Bank of New Haven, for collection. The cashier of the Eagle Bank also endorsed it in blank, and sent it to the defendants for collection. On September 20, the defendants heard of the failure of the Eagle Bank, which was indebted to them in a larger amount than the bill. The bill was duly paid to the defendants, and the proceeds credited by them to the Eagle Bank. On the 30th of September the plaintiff drew on the defendants for the money, and presented an order from the Eagle Bank for it; and the defendants refused payment. The defendants, when they received the bill, did not know that it was the plaintiff's property, except so far as it might be inferred from the endorsements and its being sent to them for collection. It was the custom or usage of the banks in the city of New York and Connecticut to transmit bills and notes to each other for collection, and to pass the proceeds in account when received to the credit of the bank transmitting, and the debt of the bank receiving them. A verdict having been given for the plaintiff under the direction of Daggett J., who tried the case, a motion was made for a new trial for misdirection. Hosmer Ch. J. considered that the defendants were not entitled to the privileges of bonâ fide endorsees for a valuable consideration, as they were merely agents for the collection and transmission of the money; that they had no lien on the proceeds of the bill as factors or bankers for the Eagle Bank, that the plaintiffs were in fact their principals in the transaction: and that the plaintiff's rights, without their assent, could not be affected by the usage shown between the banks. "No new credit," he continued, "was given, no acceptance of new bills, no alteration in the situation which the defendants and the Eagle Bank stood in towards each other, after the failure, or collection of the money." The other judges being of the same opinion, a new trial was refused.]

(64) See Goupy v. Harden, antè, p. 71.

parol authority is sufficient; and may be given by the payee of a note to the maker, for whose accommodation the endorsement is made. (*h*)

A power of attorney to endorse a note at sixty or ninety days, authorizes an endorsement of a note for any intermediate period. (*i*)

An agent who has authority to renew a note endorsed by his principal, has no authority to endorse a new note in his principal's name in exchange for the first, where the endorser has been discharged by want of due presentment and notice. (*k*)]

If an executor or administrator endorse, he binds himself personally, not the assets in his hands. (65)

If the holder of a note appoint the maker his executor, and the executor prove his will, the note is to be considered as discharged; so that if the executor afterwards endorse over the note, such endorsement will transfer no right of suit to the endorsee. (66)

So, if the holder appoint the maker one of several executors, and the maker join in proving the will, and afterwards concur in endorsing away the note, the endorsee will have no remedy against him upon the note. (66)

[(*h*) Turnbull v. Trout, 1 Hall, 336.]

[(*i*) Bank of the State of South Carolina v. Hubert, 4 M'Cord, 89.]

[(*k*) Bank of the State v. Croft, 3 M'Cord, 522.]

(65) See King v. Thom, antè, p. 77.

(66) Freakley v. Fox, 9 Barn. & Cr. 130. Defendant was sued as maker of a note payable to Reeves or order on demand. The first count stated that Reeves made his will and appointed defendant, E. C., C. C., since deceased, and E. A. executors, and died; that the executors proved, C. C. died, and defendant, E. C. and E. A. endorsed the note to plaintiff: the second count stated the endorsement by E. A. only: defendant pleaded the will, Reeve's death, and his proving the will: plaintiff replied, that Reeves made E. C. and C. C. residuary legatees; that he did not by his will forgive the debt; that he did not by making defendant an executor release or intend to release the debt; and that defendant recognised and confirmed the note as valid after Reeves died, and before the endorsements to plaintiff; that defendant paid interest upon it to his co-executors, and afterwards joined in endorsing the note in the first count. Defendant demurred; and on argument and time to consider, the Court held, that upon defendant's proving the will as executor, the note was to be considered as discharged, so that his endorsement could not set it up again, and make it a binding instrument: it was to be looked upon as paid by defendant to himself, and assets in his hands. Judgment for defendant.

And an averment, that the testator did not mean to forgive the debt, and that defendant recognised and confirmed the note as subsisting, is inadmissible; for the law considers it as discharged when the maker has proved the will, and looks upon it as paid by the executor to himself. (66)

Sect. 3.—The transfer of a bill or note may be made either before the expiration of the time limited for its payment, or, unless (67) the sum payable thereby be under five pounds (68), afterwards.

[A person to whom a bill or note is endorsed before it is due, for a good consideration, and without notice, is not subject to any defence of want of consideration between the original parties. (*l*)

And such an endorsee will not be liable to the set-off of a claim which the maker has against the payee, even if the endorsee had notice of such claim before receiving the note, and also that the maker proposed to set off the claim. (*m*)]

But a man who takes a bill after it is due, takes it subject to all the objections and equities to which it was liable in the hands of the person from whom he takes it. (69)

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(67) Vide 17 Geo. 3. c. 30. s. 1. ante.

(68) Dehers v. Harriott, 1 Show. 163. A bill was endorsed to the plaintiff after it was due, and he had judgment without any objection on this ground.

Mutford v. Walcott, Lord Raym. 575. Holt C. J. said, he remembered a case where a bill was negotiated after the day of payment, and he had all the eminent merchants in London with him at his chambers, and they all held it to be very common and usual, and a very good practice. [See also Graves v. Key, 3 B. & Adol. 313.]

[(*l*) Thompson v. Gibson, 13 Martin, 150.]

[(*m*) Savings Bank of New Haven v. Bates, 8 Conn. 505.]

(69) Taylor v. Mather, B. R. Pasch. 27 Geo. 3. 3 Term Rep. 83, n. Endorsee of a note against the maker. It appeared to have been endorsed after it was due, and there were many circumstances which led the Court and jury to conclude it had been unfairly obtained, upon which the jury found for the defendant. A new trial was refused upon the merits, and per Buller J. "It has never been determined that a bill or note is not negotiable after it is due, but if there are any circumstances of fraud in the transaction, and it is endorsed to the plaintiff after it is due, I have always left it to the jury upon the slightest circumstance to presume that the endorsee was acquainted with the fraud." The rest of the Court concurred in this opinion.

Brown v. Davies, 3 Term Rep. 80. Davies drew a note payable to

And if such person were agent only, to receive the money for his principal, the person to whom he passes it will be ac-

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Sandall or order; Sandall endorsed it to Taddy, and he had it presented, and noted for nonpayment. Davies then paid the money to Sandall, and he took up the note from Taddy, but instead of returning the note to Davies, endorsed it to Brown. Brown thereupon sued Davies, and on Davies offering to prove these facts, Lord Kenyon thought they would not amount to a defence, unless it could be proved that Brown knew them when he took the note, and he rejected the evidence: but upon a rule nisi for a new trial, and cause shown, Lord Kenyon said, he thought there ought to be further inquiry; it did not strike him at the trial that the note had been noted before Brown took it, and that that circumstance ought to have awakened Brown's suspicion. Ashhurst and Buller Js. thought that the party taking a note after it was due was to be considered as taking it on the credit of the person from whom he received it, and that whatever would be a defence against the giver would be a defence against the receiver; upon which Lord Kenyon said, he agreed with that, if the note appeared on the face of it to have been dishonored, or if knowledge could be brought home to the endorsee that it had been so; but otherwise he was not prepared to go that length. (Sed vide post, Boehm v. Sterling, n. (78), p. 142, where he expresses an opinion, that it made no difference whether the bill appeared upon the face of it to have been dishonored, or not.) Grose J. said, if collusion could be proved between the defendant and Sandall, the defendant would not be entitled to insist on the objection, but as the case then stood he thought there ought to be a new trial. Rule absolute.

[Banks v. Colwell, Launceston Spring Assizes, 1788, before Buller J. cited 3 Term Rep. 81. Endorsee of a note payable on demand, against the maker. The note was given for smuggled goods; part of it was paid: and it was not endorsed to the plaintiff till a year and a half after it was given; no privity was brought home to the plaintiff, but Buller J. was clearly of opinion he ought to be nonsuited; and he said it had been repeatedly ruled at Guildhall, that if a bill or note was endorsed over after it was due, the endorsee took it on the credit of the endorser, and stood in his situation.

Brown v. Turner, 7 Term Rep. 630. Pritchard paid some stockjobbing differences for Turner, and drew on him for the amount; Turner accepted the bill, and after it became due Pritchard endorsed it to the plaintiff for a prior debt. Lord Kenyon however thought that as Pritchard could not have recovered on the bill, the plaintiff could not, and directed a verdict for the defendant; and the Court was clearly of opinion that the direction was right, and refused a rule nisi for a new trial. See also Good v. Coe, cit. 7 Term Rep. 427. 429.

The principle stated in the text is fully recognised in many American cases. Gold v. Eddy, 1 Mass. R. 1; Blake v. Sewell, 3 Mass. R. 556; Hemmenway v. Stone, 7 Mass. R. 58; Williams v. Matthew, 3 Cowen, 252; O'Callaghan v. Sawyer, 5 Johns. R. 118; Comstock v. Hoog, 5 Wend. 600; Hernman v. Malhillan, 13 Martin, 605; Peek v. Wakely, 1 M'Cord Ch. Cas. 43. See post, chap. xii.

The principle stated in the text seems not to be fully recognised in South Carolina. It has been held there, that a note payable to bearer, and passed after it is due, does not carry along with it all the equities

countable to the principal for whatever he receives thereon, whether it be money,

Or a new bill (70)

And an order from the principal to prohibit payment of such new bill, will be a bar to any action at the suit of the person, to whom the first bill was passed. (70)

[It seems that bank post notes are not subject to the common rule of notes tranferred after they are due, but are rather regarded like common bank notes, as they are intended to circulate after they become due. (*n*)

Where a promissory note payable on demand, is endorsed within a reasonable time after the date, it is held in the United States, that the endorsee has all the rights of an endorsee receiving a negotiable instrument before it becomes due. (*o*) But if it be not endorsed within a reasonable time, it will be considered as overdue and dishonored; and the endorsee will be subject to any defence which would have been available against his endorser. (*o*)

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which may subsist between any intermediate bearer and the maker, but is only subject in the hands of a *bonâ fide* holder without notice, to the equities subsisting between the original parties. Nixon v. English, 3 M'Cord, 549.]

(70) Lee v. Zagury, 8 Taunt. 114. Sebag had a bill accepted by defendant, over due; he sent it to White, that White's correspondent might get the amount for Sebag: White's correspondent endorsed it to Vidal for a debt he owed Vidal, and Vidal not being able to obtain the money, got a new bill from defendant for the amount, and endorsed it to plaintiffs as his agents. Sebag gave defendant notice not to pay this bill, and an action being brought thereon, the defence was, that plaintiffs were mere agents for Vidal; and that as Vidal took the first bill after it was due, he stood in the place of White; and as White would have been accountable to Sebag for whatever he received in respect of the first bill, Vidal was equally so accountable; and then the second bill was, as against Vidal, the property of Sebag, and Sebag's prohibition to defendant not to pay the second bill, was an answer to the action upon it. Gibbs C. J. was of this opinion, and left it to the jury whether plaintiffs were not mere agents to Vidal, and whether the second bill was not the property of Sebag. The jury found for defendants; and on rule nisi to enter verdict for plaintiffs, the other judges agreed with Gibbs C. J.: rule discharged.

[(*n*) Fulton Bank v. Phoenix Bank, 1 Hall, 562.]

[(*o*) Ayer brought an action against the defendants as makers of a note payable on demand to Page or order, and by him endorsed, without recourse to himself, to Ayer the plaintiff. The defendants at the trial offered to prove that the note was endorsed eight months after it

What is such a reasonable time, is not precisely settled; though it is clear that a note is to be considered as overdue and dishonored a year or even eight or nine months from the date; but not overdue a few days after the date. (*o*)

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was given, and without the knowledge of Ayer, and for the benefit of Page himself, and that the note was fraudulently obtained by Page. But the evidence was rejected; and verdict for plaintiff. On motion for a new trial, Parsons C. J. delivered the opinion of the Court. He considered the length of time of itself sufficient "to let the defendants into any defence which could be made by them if Page were plaintiff. The restricted endorsement also made eight months after the note is due is enough to charge the endorsee with such negligence in making further inquiries, as will subject him to the same defence, that might be made against the endorser." He considered besides, that if Ayer was only trustee of Page, the same defence was admissible, as if Page were the plaintiff of record, whether the note was endorsed before or after becoming due. New trial. Ayer v. Hutchins, 4 Mass. R. 370.

So where a note payable on demand was endorsed eighteen months after the date, it was held that the maker might make the same defence against the endorsee, which he could have done against his endorser, the payee. Kent C. J. delivered the opinion of the Court. "This lapse of time must clearly be considered as placing the note in the situation of one due and dishonored, and as imposing on the endorsee the same risk. He takes it on the credit of the person from whom he receives it." Freeman v. Haskins, 2 Cain. R. 368.

See also Loomis v. Pulver, 9 Johns. R. 244; and Nevis v. Townsend, 6 Conn. 5.

Dunkin made a note payable on demand to Newton or bearer, dated Jan. 16th, 1805. Newton endorsed it to Losee April 3d, 1805. In a suit on this note by Losee against Dunkin, the Common Pleas allowed the defendant to prove a payment upon it to Newton shortly after the date of the note. On Error—Per Curiam. "There is no precise time at which such a note is to be deemed dishonored. The demand must be made in a reasonable time, and that will depend upon the circumstances of the case and the situation of the parties. There are no particulars peculiar to this case disclosed; and the Court cannot say that it was *erroneous* to let in the defence; for the circumstances of this case might have been such as to justify the conclusion, that the note was dishonored when it was assigned." Losee v. Dunkin, 7 Johns. R. 70.

In a subsequent case, in an action by the endorsee against the makers of a note payable on demand, which had been endorsed to him five months after the date,—Yates J., who delivered the opinion of the Court, said, "Each case ought, perhaps, to be governed by its own circumstances. In the one before us, a number of payments have been endorsed, and the last but a few days prior to the assignment, and about five months after its date. From the last endorsement it may be presumed, that all antecedent payments had been noticed and entered in the same manner; the plaintiff had a right to consider the amount due at the time of the transfer after deducting the payments, to be the true balance; the defendant was, therefore, properly prevented from im-

The presumption is that the note was transferred within a reasonable time, unless the contrary is proved. (*p*)

What is a reasonable time has been considered a question of law when the facts are settled. (*q*)

So the presumption of law, where a bill or note is endorsed in blank, is that it was endorsed on the day of its date, or at least before it was due. If the defendant alleges that it was endorsed after it became due, the burden of proof is on him to show it: (*r*)

Therefore if the maker of a note in an action against him wish to set up payment to the payee, he must prove that the endorsement was made subsequently to the note becoming due and subsequently to the payment. (*s*)]

It has been held that a man who takes a bill after it is due will stand in the same situation as if he had taken it before, if

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peaching the note as given for too large a sum." Sanford v. Mickles, 4 Johns. R. 224.

A note made at Portland, Maine, was, seven days after the date, endorsed by the payee to Thurston in Boston. Thurston sued the maker of the note, and the question was, whether the latter might be permitted to prove in defence, a want of consideration between him and the payee. Parsons C. J. delivered the opinion of the Court. "It is certainly a correct principle of law that if the endorsee purchase a note, when from the length of time in which it has been payable, there is reasonable cause to suspect that it has been dishonored, he shall not deprive the maker of any defence, which would avail him against the promisee. But this note cannot be considered as overdue, within the true intent of this principle; as there were no circumstances existing, which ought to have induced in the mind of the purchaser, a suspicion that the note had been dishonored." Thurston v. M'Kown, 6 Mass. R. 76.

See also Hendricks v. Judah, 1 Johns. R. 319.

If the maker of a note who has paid it to the payee, neglect to make the defence to an action by an endorsee to whom it was endorsed after the day of payment, he cannot recover the money back in an action against the payee. Loomis v. Pulver, 9 Johns. R. 244. Battey v. Button, 13 Johns. R. 187. But the maker may recover the money back, where the note was endorsed before becoming due, so that the payment was no defence to the action by the endorsee: and the declaration in such a case is bad if it do not state the endorsement to have been made before the note became due. Battey v. Button, 13 Johns. R. 187.]

[(*p*) Hendricks v. Judah, 1 Johns. R. 319. And see Webster v. Lee, 5 Mass. R. 334.]

[(*q*) Furman v. Haskin, 2 Cain. R. 368.]

[(*r*) Canfield v. Gibson, 13 Martin, 143.]

[(*s*) Pinkerton v. Bailey, 8 Wend. 600.]

he held it for value before it was due, and it be re-delivered to him for the same value afterwards ; (71)

As, if a banker's customer deposit a bill with him for value before it be due, get it from him again before it is due, and again deposit it with him for value after it is dishonored. (71)

So, if a customer being indebted to his banker deposit with him bills as a security on account, though the bills were accepted for the customer's accomodation, and though at the time when they afterwards become due, the balance of accounts between the customer and the banker were in favor of the customer; yet, if the bills be suffered to remain in the banker's hands until the balance turns in his favor, the banker will hold as in his former right, and will be entitled to recover against the acceptor. (72)

So, if an endorsee for value endorse away the bill or note, and it be returned to him after it becomes due, and he pay the amount, he will be entitled to recover the full amount from

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(71) Bosanquet v. Dudman, 1 Stark. 1. Clarkson and Co. banked with plaintiffs, and deposited a bill with them as a security for their engagements on behalf of Clarkson and Co., but before it became due Clarkson and Co. got it back from plaintiffs. After it was dishonored Clarkson and Co. re-delivered it to plaintiffs, but in the interim Clarkson and Co. bought a ship from the drawer, for whose accommodation defendants had accepted, and agreed to give up this bill in part payment, so that Clarkson and Co. could not have sued upon the bill; but Lord Ellenborough held, that when the bill was returned to plaintiffs they returned to their former right, and were not affected by what Clarkson and Co. had done: verdict for plaintiffs.

(72) Attwood v. Crowdie, 1 Stark. 483. Defendants lent their acceptances, for the accommodation of Mattingley and Co., to two bills at three and four months after date, payable to Mattingley and Co., or order; Mattingley and Co. having been pressed by their bankers for security, sent them these and other bills on account: at the time these bills became due, and at several periods afterwards, the balance between Mattingley and Co. and the bankers was in favor of Mattingley and Co.; but Mattingley and Co. failed, and the balance then was the other way. The bankers sued defendants upon these acceptances; defendants insisted that as the balances were against the bankers when these bills became due, and afterwards, these bills must be considered as satisfied, or at least that plaintiffs must stand as if the bills had been endorsed to them after they became due: but Lord Ellenborough held, that as the bills were sent *on account*, which must have meant the floating account, though there were periods at which the plaintiffs had no claim upon them, and they might have been demanded back, yet as they were suffered to remain, the plaintiffs' claim revested, when by fresh advances the balance turned in their favor—and plaintiffs had a verdict.

the antecedent parties, though some of those parties had lodged securities with the person who held the bill when it became due, and part of the amount had been paid on those securities; (73)

At least, if he did not know when he took up the bill, that such securities had been so lodged. (73)

And though a man, who takes a bill after it is due, takes it subject to the objections to which it was liable in the hands of the person from whom he took it, he is not subjected to every description of evidence to which that person would be liable; (74) therefore, though the entries in that person's books, if made at the time of passing the bill and accompanying that act, might be evidence against him, yet entries which cannot be proved to have been so made, and might have been made afterwards, are not. (74)

[Though one partner in a firm cannot sue the partnership, on a note given him by the company for money borrowed of him, yet a person to whom he endorses it when it is overdue, can sue the partnership upon it. (*t*)]

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(73) Buzzard v. Flecknoe, 1 Stark, 333. Plaintiffs endorsed two bills to Lord; Lord held them three months after they fell due, and then called on plaintiffs, who took them up. In the interim Lord had received another bill from the drawer as a collateral security, but plaintiffs did not appear to have known that fact; that bill was afterwards satisfied, and plaintiffs having brought this action against the acceptor, he insisted that the amount of that bill ought to be deducted on the ground that plaintiffs stood in the situation of Lord; but Lord Ellenborough thought otherwise, because plaintiffs' title did not first commence after the bill became due, but was referable to their prior holding; had they been discharged from the bills, they might have stood in the situation of new holders. Verdict for the whole amount.

(74) Collenridge v. Farquharson, 1 Stark. 259. In an action by endorsee against endorser, it appeared that one Powell was holder when the bill became due, and that he had afterwards endorsed the bill to plaintiff, there being accounts between defendant and Powell, which would have regulated the extent to which Powell could have recovered. Defendant offered in evidence Powell's books, to show how those accounts stood, and insisted that whatever would have been evidence against Powell would be evidence against plaintiff; but Lord Ellenborough held, that though an entry by Powell at the time and accompanying the act would have been evidence, an entry not accompanying the act, and which might have been made afterwards for the very purpose of being used in evidence, was not, and the plaintiff had a verdict.

[(*t*) Nevins v. Townsend, 6 Conn. 5. Isaac Townsend and Knee-

Though a bill be endorsed over *before* the time appointed for its payment, yet if acceptance have been previously refused, the endorsee (75) will be liable to the same objections

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land Townsend had been partners under the firm of Isaac Townsend & Co. The partnership was dissolved in 1815. On September 3, 1817, Isaac Townsend signed a note in the partnership name, promising to pay Kneeland Townsend on demand $890, "being for cash borrowed of him in New York," April 14, 1814, with interest from that date. Kneeland Townsend endorsed this note to the plaintiff May 25, 1818, for a valuable consideration. This action was brought against the partners on the note. It was held to be no defence to the action that the partnership accounts were unsettled. After a verdict for the plaintiff, the defendants moved for a new trial. Hosmer J. admitted the principle that the note being endorsed when overdue, was subject to every infirmity which it had when in the hands of the payee. But he said he was incapable of discerning any such infirmity. "The money was not advanced by Kneeland Townsend, *qua* partner; but as an individual, to be repaid wholly, and not in part; and to enable him to obtain the amount speedily, the contract assumed the before-mentioned form. Although he could maintain no suit upon it, this did not arise from any infirmity in the contract, or any want of equity; but from the principle that he could not be both plaintiff and defendant." The object of the note he considered was to enable Kneeland Townsend to replace the money lent by him, by assigning the partnership security. "It cannot be distinguished in principle from a sum of money loaned to both parties by a stranger, a note of the partnership being delivered as security for the repayment. Hence, the sum loaned by Kneeland Townsend was not to furnish an item in the partnership account; nor was the payment of it dependent at all on the final settlement of the partnership concerns."]

(75) Crossley v. Ham, 13 East's Rep. 498. The defendant for the accommodation of Clark, endorsed two bills drawn by Clark in America, upon Dickinson and Co. in London, for 450*l.* each, in favor of the defendant, dated 10th of February, 1804, and payable 60 days after sight. These bills were paid over by Clark to Parry, in February, 1804. The defendant, Parry and Clark, then, and until after the 14th of April, 1808, resided in America. On the 1st of March, Parry endorsed and remitted the bills to his agents in London, with directions to make a payment to the plaintiff, to whom he then, and still, was indebted. On the 26th of April, the bills were presented for acceptance, dishonored, and protested for non-acceptance; and notice thereof was given to the defendant. The plaintiff having been advised of the remittance by a letter from Parry, dated on the 12th of April, applied to Parry's agents for 450*l.*; and on the 6th of June they delivered one of the bills to the plaintiff, apprising him of its dishonor, and that therefore he took the bill, subject to all its infirmities. The bill became due on the 29th of June, and payment being refused, this action was brought. The defendant, however, produced at the trial an instrument signed by Parry, dated 14th of April, 1804, by which he agreed that the defendant, on paying one of the bills in London, should be exonerated from paying the other; and the defendant proved his having, on the 2d of July, paid one of the bills, which then remained in the hands of Parry's

as might have been taken against his endorser, if he take the bill with a knowledge of its having been dishonored;

And if the bill be noted for non-acceptance, he must be taken to have this knowledge.

But if he take the bill without this knowledge, and be a bonâ fide holder for a valuable consideration, he will not be liable to such objections. (76)

And if the holder's immediate endorser might have recovered upon a bill or note, it is no defence to an action by the holder that an (77) antecedent party would have been precluded from recovering upon it.

The rule as to bills and notes when taken after they are

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agents, who delivered it up on payment. This agreement was, until the 2d of July, unknown to the plaintiff and Parry's agents. A verdict was found for the plaintiff, and a case reserved for the opinion of the Court. The Court (Le Blanc J. absente) held that the plaintiff, having taken this bill after its dishonor, had taken it with all its infirmities, and subject therefore to the agreement between Parry and the defendant. Postea to the defendant.

(76) Dunn v. O'Keefe, (6 Taunt. 305.), 5 M. & S. 282. Action on bill drawn by defendants on Ricketts and Co. payable to Sinclair or order, and by him endorsed to plaintiff; breach for non-acceptance; plea, that before endorsement to plaintiff, Sinclair presented it for acceptance, that acceptance was refused, and notice thereof not given to defendants; replication, that it was not so presented, and verdict indè that it was, but non obstante veredicto, judgment for plaintiff. On error it was urged that the presentment by Sinclair, and want of notice indè, discharged defendants entirely from the bill; but the Court held, it did not discharge him against an innocent endorsee, who took the bill for a valuable consideration before the time appointed for its payment; and as it was not alleged in the plea that plaintiff knew of the prior dishonor, or that it was endorsed to him after it was due, or that he did not give value for it, judgment affirmed.

(77) Chalmers v. Lanion, 1 Campb. N. P. C. 383. To an action by the endorsees against the acceptor of a bill, one ground of defence was, that the bill had been accepted for a debt contracted in a smuggling transaction, and that though it had been endorsed for value, before it became due, to a bonâ fide holder, yet that it had been endorsed by him to the plaintiffs after it was due; and it was contended that having been so endorsed to the plaintiffs, it was competent to the defendant to set up the illegality of the consideration as a defence, in like manner as if the action had been brought by the payee. But Lord Ellenborough held, that if the plaintiff's endorser might have maintained an action upon the bill, the circumstance of the endorsement to them having been made after the bill had become due, was insufficient to let in the proposed defence. And the Court of King's Bench concurred in opinion with his Lordship.

due, is in general applicable also to (78) checks upon bankers.

But it will not apply to such checks where they appear to have been issued long after their date. (78)

A bill or note cannot be (79) endorsed or negotiated after it has been once paid, if such endorsement or negotiation would make any of the parties liable who would otherwise be discharged.

But an endorser who pays a bill, may endorse or negotiate it, because his endorsement or negotiation will make no person liable but himself, and those whom he might sue. (80)

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(78) Boehm v. Sterling, 7 Term Rep. 423. Muilman lent the defendant his acceptance for 2444*l.* 14*s.* at three months, and the defendant gave Muilman a check upon his banker for the amount, dated 17th of Feb. 1796. The year was perhaps intended for 1797. On the 20th of January, 1797, Muilman gave this check to the plaintiff in payment of an old debt. Muilman died before his acceptance became due, and the defendant was obliged to take it up. In an action upon the check, the defendant urged that Muilman could not have sued him upon this check, and that therefore the plaintiff could not, because he took it so many months after it was dated. Lord Kenyon left it to the jury whether the plaintiff took it bonâ fide, and without knowing the circumstances under which Muilman held it. They found for the plaintiff. And on a rule nisi for a new trial, and cause shown, Lord Kenyon admitted that it was to be considered as a rule that the person who takes a bill after it is due, is subject to the same equity as the party from whom he took it, though the bill did not appear upon the face of it to have been dishonored; and he thought there was no distinction in this respect between checks upon bankers and bills of exchange; but as the defendant had not issued this check until nine months after it was dated, he thought it was not competent to him to object to the time when the plaintiff took it; the other Judges agreed that the rule mentioned by Lord Kenyon was to be considered as settled, but for the reasons given by Lord Kenyon that it did not bear upon this case. Rule discharged.

R. acc. Tinson v. Francis, 1 Campb. N. P. C. 19.

(79) Beck v. Robley, B. R. Tr. 14 Geo. 3. cited 1 H. Blackst. 89, n. Brown drew a bill upon Robley, which Robley accepted, payable to Hodgson or order; Robley did not pay it when it was presented, upon which Brown took it up; Brown afterwards endorsed it to Beck, and Beck brought an action upon it against Robley; but the jury thought that when Brown took up the bill, its negotiability ceased, and found for the defendant; and on a rule nisi for a new trial, the Court thought the jury right, and Lord Mansfield said, "When a draft is given payable to A. or order, the purpose is, that it shall be paid to A. or order; and when it comes back unpaid, and is taken up by the drawer, it ceases to be a bill. If it were negotiable here, Hodgson would be liable, for which there is no color."

(80) Callow v. Lawrence, 3 M. & S. 95. Pywell drew on defendant, payable to his own order, and endorsed to Taylor; defendant accept-

And if a bill or note be paid before it is due, and nothing done upon it to mark such payment, an endorsement after-

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ed the bill, but did not pay it; Pywell took it up, and endorsed it to plaintiff. It was urged, that after Pywell had once paid it he could not endorse it, its negotiability was at an end; but on cause shown the Court was clear that Pywell's payment did not terminate its negotiability, because his endorsement would make no person liable but himself and defendant, and defendant had never been discharged. Rule discharged.

Hubbard v. Jackson, 4 Bingh. 390. In an action in 1827, against the acceptor of a bill due in 1821, it appeared that Melville, the drawer, had been sued upon it in 1821, and forced to pay it, and that about a year and a half afterwards he endorsed it to plaintiff. Plaintiff had a verdict; and upon motion for nonsuit or new trial on the ground that Melville had no right to endorse it over after it was overdue and paid, the Court held that as his endorsement would give no right of action against any of the parties to the bill except himself and the acceptor, and as nothing had occurred to discharge the acceptor, the endorsement was valid, and the action maintainable. Rule refused.

[It was formerly held in Massachusetts that a note or bill once paid ceased to be negotiable. See Blake v. Sewell, 3 Mass. R. 556; Boylston v. Green, 8 Mass. R. 465; and Emerson v. Cutts, 12 Mass. R. 78. But the doctrine stated in the text is now fully established.

The defendants were sued as makers of a note payable to Littlefield, and endorsed by him. Littlefield paid the note at maturity, and afterwards passed it to the plaintiff, Guild. The plaintiff was nonsuited at the trial subject to the opinion of the Court. Parker C. J. delivered the opinion of the Court. "In England at this day, the proposition which has been received here without qualification, that a negotiable note once paid, cannot be transferred, is restrained to cases, where by such transfer some party to the bill or note might be prejudiced, or troubled with a suit, who ought to be discharged. As if there be several endorsers, none shall be allowed to transfer it but the last: because if the note is taken up by any prior endorser, and again put in circulation by him, the subsequent endorsers may be exposed to a suit by the new assignee. But where no such consequence will follow, an assignment by the party taking up the bill is lawful, and an assignee may maintain an action upon it in his own name." The Court considered the distinction a correct one, and granted a new trial, overruling the cases of Blake v. Sewell, and Boylston v. Green, supra. Guild v. Eager, 17 Mass. R. 615.

So in New York it has been held that the negotiability of a note is not impaired by its being paid and taken up by an endorser, where no party who was not at all events bound to pay it, could be sued in consequence of its being again put in circulation. Havens v. Huntington, 1 Cowen, 387. See also Williams v. Matthews, 3 Cowen, 252. The same doctrine is recognised in Maine. Mead v. Small, 2 Greenleaf, 207.

In a case in New Hampshire, the Court take the position generally, that "it is very clear that where a note has once been paid it ceases to be negotiable." But there were other sufficient grounds for judgment in favor of the defendant. Bryant v. Ritterbush, 2 N. Hamp. R. 212.]

wards, before the time it would have become due, will give the endorsee, if he take it bonâ fide and for a valuable consideration, the same right as if there had been no such payment. (81)

[But if the endorsee, at the time he receives the note, know that it has been paid by the maker, the endorsee cannot maintain any action upon it against the maker. (*u*)

A bill or note may be sold without endorsement, while it is in suit, in which case the purchaser has the beneficial, and the seller the legal interest, and the suit can be maintained for the benefit of the purchaser. (*v*)

After judgment on a note against the maker, the note ceases to be negotiable. But if an endorser pays the note, he can sue the maker for money paid. (*w*)

So, after a note has been adjudicated upon before the commissioners on the estate of a deceased insolvent in Vermont, its negotiability is taken away, and any suit upon it must be in the name of the party who brought it before the commissioners. But the interest in the note may be assigned. (*x*)

A bill may be transferred after the death of any party to it, and the person to whom it is transferred will have a valid claim against the personal representatives of the deceased party. (*y*)

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(81) Burridge v. Manners, 3 Camb. 194. Four days before note became due, some person went to the banker's where it lay, and paid it, and carried it away; it was not cancelled, nor any minute made upon it to denote such payment; within the four days it was endorsed bonâ fide, and for valuable consideration, to plaintiff, and in an action by him against the payee this payment was relied on, and it was urged that after payment it could not be negotiated; sed per Lord Ellenborough, "that means payment in due course, not payment by anticipation; had the note been due before plaintiff took it, he would have taken it with all its infirmities, but here was nothing to awaken his suspicion; this payment does not extinguish it more than discounting would; whilst its time is running, it remains negotiable." Verdict for plaintiff.

[In Webster v. Lee, 5 Mass. R. 334, Parsons C. J. says, that "in an action by an endorsee of a note against the maker, the law admits the defendant to prove payment before the endorsement." See also Baker v. Wheaton, 5 Mass. R. 509. But this expression must be restricted to the case of an endorsement after the note becomes due.]

[(*u*) White v. Kibling, 11 Johns. R. 128.]

[(*v*) Williamson v. Allen, 2 Gill & Johns. 344.]

[(*w*) Prest v. Vanarsdalen, 6 Halst. 194.]

[(*x*) Jarvis v. Barker, 3 Verm. R. 445.]

[(*y*) Perry v. Grammond, 1 Wash. C. C. R. 100.]

If a person make advances, upon the faith of a bill, for the benefit of the drawer, to the drawer's agent, in whose possession the bill is,—the agent after the drawer's death may transfer the bill to the person making the advances, who can maintain an action against the drawer's representatives upon it. (*z*)]

If a (82) man endorse a bill or note before the sum or time of payment be mentioned therein, he will be precluded from saying that his endorsement was prior to the completion or issuing of the bill or note: and this, though the holder knew when he took it in what state the bill was at the time of the endorsement.

[So if a person write his name on a blank paper to be used as an endorsement of a note to be written on the other side, and the paper thus endorsed be obtained from him by fraud, and a different note from the one intended be written on the other side, he will be liable as endorser to a *bonâ fide* holder for a valuable consideration. (*a*)

[(*z*) Perry v. Crammond, 1 Warb. C. C. R. 100.]

(82) Russel v. Langstaffe, Dougl. 514. The defendant, to accommodate Galley, endorsed his name on five copperplate checks, made in the form of promissory notes, but in blank, without any sums, dates, or times of payment being mentioned therein, and delivered them to Galley; Galley filled them up as he thought fit, and the plaintiff discounted them; the plaintiff knew the notes were blank at the time of the endorsement; Galley not paying them when they became due, the plaintiff brought this action. Hotham B., before whom the cause was tried, was of opinion, that as the notes were incomplete when the defendant endorsed them, no subsequent act of Galley could make them otherwise, because that would alter the effect of the defendant's endorsement, and he accordingly directed a verdict for the defendant; but upon an application for a new trial, and cause shown, Mr. Wallace, the attorney-general, gave up the point, though Mr. Lee afterwards argued it; and Lord Mansfield said, "Nothing is so clear as the point; the endorsement on a blank note is a letter of credit for an indefinite sum; the defendant said, trust Galley to any amount, and I will be his security; it does not lie in his mouth to say, the endorsements were not regular." A new trial was accordingly granted; and a verdict having been found for the plaintiff in a similar action before Lord Mansfield, the defendant submitted in this, without going to a second trial.

[Violett endorsed a blank paper with intent to have a promissory note written on the other side, it was afterwards filled up as intended. The Court held that Violett was liable as endorser of the note, and "that he was concluded from saying or proving that it was not filled up when he endorsed it." Violett v. Patton, 5 Cranch, 142.]

[(*a*) Sullivan and Co. being about to be absent from Boston, left with a clerk a number of papers on which the name of the firm was written

So, if a person endorse his name on a note, in which a blank is left for the date, and leave it with the maker, it is an authority to the maker to put such date on it as he pleases; and the endorser will be liable on the note in the hands of a bonâ fide holder, whatever date the maker may put upon it, even if it is dated before the time when the endorsement is actually made. (*b*)

Even if the holder to whom the maker passes it, knows of its being so antedated, it has been held to be no objection to his recovery on it. (*c*)]

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in blank, some to be used as notes endorsed by the house, and others as notes signed by the house. These papers were to be filled up when money was to be advanced on goods, or to renew the notes of the house at the banks. The clerk was directed to deliver one of the blanks to the maker of a certain note on which Sullivan and Co. were endorsers, in order to enable him to renew it. The clerk accordingly delivered the maker one of the endorsed papers. He, afterwards, pretending that by some mistake it had become useless to him, and feigning to burn it in the clerk's presence, procured another blank of the clerk, and by a similar contrivance a third and fourth blank, the last of which was used for the purpose intended by Sullivan and Co. Sullivan and Co. were sued by bonâ fide holders as endorsers of one of the first blanks, which had been filled up as a note by the maker. Verdict for the plaintiffs, subject to the opinion of the Court. Parsons C. J. delivering the opinion of the Court said, that this note could not be considered as a forgery of the names of the defendants, although it was a gross fraud, since when the defendants' name was endorsed, it was intended that something should be afterwards written to which their name should apply as an endorsement. He said also that writing the note was not such a fraud as would discharge the endorsers against an innocent endorsee; that since one of two innocent parties must suffer, the loss ought to fall on the endorsers, on account of their laches and misplaced confidence in their clerk which had given the promiser the opportunity to commit the fraud, and not on the endorsees, who were not chargeable with any neglect. The Court also thought that a different opinion would operate injuriously upon the commercial community. Judgment on the verdict. Putnam v. Sullivan, 4 Mass. Rep. 45.

It has been decided on the same principle in Scotland, that "if a person signs a blank bill stamp, he will, in like manner, be liable to an onerous endorsee, in whatever sum may be filled up covered by the stamp." Bell Comm. 303, No. 333, cited in Glen on Bills, 65, note.

"Perhaps if a blind man had a note falsely and fraudulently read to him, and he endorsed it supposing it to be the note read to him," he would not be liable as endorser, because he is not guilty of any laches. By Parsons C. J. in Putnam v. Sullivan, 4 Mass. R. 45.]

[(*b*) Mitchell v. Culver, 7 Cowen, 336; Mechanics and Farmers' Bank v. Schuyler, 7 Cowen, 337, note.]

[(*c*) Mitchell v. Culver, 7 Cowen, 337.

If a man endorse a bill or note with blanks for sum and date, and die before they are filled up, the person filling them up can make no objection on account of such previous death. (83)

And if a bill or note be post-dated (as in most cases it (84) may be), an endorsement before the date (85) will entitle the endorsee to sue the drawer or maker, although the endorser die before the date of the bill or note.

Upon the transfer of a bill drawn in sets, each part must be delivered to the person in whose favor the transfer is made;

But quære whether an endorsement gives an authority to antedate the note, and if the endorsee who receives it from the maker know it to be so antedated, ought he to recover. A person who endorses a note without a date certainly cannot expect that it is to be dated before the time when he makes his endorsement. Thus, if the note be endorsed Jan. 1, 1831, and is payable in three months, and the maker dates it Oct. 1, 1830, the endorser may be called on in three days, to pay what he probably expected not to be liable to pay for three months at least.]

(83) Usher v. Dauncey, 4 Campb. 97. F. D. and three others were partners, and used to draw bills, with blanks for sums and date, to raise money. F. D. drew one 28th February to his own order, and endorsed it in blank, and died 15th March. 22d April the clerk to the surviving partners inserted as the date, 27th February, and as the sum, 1574*l.*; and an agent of theirs got it discounted: in an action thereon against the surviving partners, it was urged, that F. D.'s death countermanded all authority in the clerk to fill up a bill with his name to it, and that the bill was therefore void: but Lord Ellenborough thought the clerk's authority emanated from all the partners, and that when he filled up the bill on account of their survivors and for their use, he acted as their agent and bound them, and that the case was within the principles of Russel v. Langstaffe. The plaintiff had a verdict, and the Court of King's Bench refused to set it aside.

(84) See antè, p. 21.

(85) Passmore v. North, 13 East's Rep. 517. The defendant, on the 4th of May, 1810, drew a bill for 200*l.* on Brook and Co., dated the 11th of May, 1810, payable to Totty or order, sixty-five days after date. On the 5th of May, Totty endorsed this bill to the plaintiff for a valuable consideration; and on the same day died. After the 4th, and before the 11th of May, the defendant received effects of Totty's to the amount of about 130*l.* to answer this bill. On the 12th of May, the defendant advised the drawees, of the bill having been drawn, and of Totty's death, and desired them not to accept or pay the bill. Acceptance and payment were accordingly refused: and this action was brought against the drawer. A verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench, on a case reserved. The Court, after adverting to the 17 Geo. 3. c. 30. as to bills for less than 5*l.*, and to the 48 Geo. 3. c. 149. as to post-dating drafts upon bankers, held clearly, that the plaintiff was entitled to recover for the whole amount of the bill; and he had judgment accordingly.

otherwise the same inconveniences may follow, which would ensue upon a neglect to deliver each of them to the payee.

The endorsement of a bill or note, implies an undertaking from the endorser to the person in whose favor it is made, and to every other person to whom the bill or note may afterwards be transferred, exactly similar to that which is implied by drawing a bill, except that in the case of a note, the stipulations with respect to the drawer's responsibility and undertaking do not apply; and a transfer by delivery only, if made on account of an antecedent debt, implies a similar undertaking from the person making it, to the person in whose favor it is made.

And a transfer by delivery, where the bill or note is sold, may imply that it is a genuine bill. (86)

An endorsement is no warranty that the prior endorsements are genuine. (87)

At least it is not, in the case of a person who has the same means of judging as the endorser, and who uses those means, and judges for himself. (87)

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(86) Jones v. Ryde, 5 Taunt. 488. 1 Marshall, 157. Plaintiff sold defendant a navy bill as and for a bill of 1800*l.*, which it imported to be: it turned out that the bill was issued for 800*l.* only, and had afterwards been altered. Government paid the 800*l.* only, and plaintiff who had parted with the bill, paid his vendee the 1000*l.*, and called upon defendant to reimburse him; defendant refused, and plaintiff sued him. It was urged for defendant, that both parties were equally innocent; but the Court held, that as defendant took upon himself to send as a bill for 1800*l.* what in fact was a bill for 800*l.*, the consideration pro tanto had failed, and plaintiff was entitled to recover it back. In Bruce v. Bruce, 1 Marshall, 165. the same point was decided upon a victualling bill.

[In a case in Massachusetts, it was held, that if a note was sold, the buyer could maintain no action against the seller, though an endorsement upon it proved to be forged, both parties being ignorant of the forgery at the time of the sale. But it was held in the same case, that if the holder of the note intended to purchase merchandise, and the payment by the note was not a part of the original stipulation, but merely an accommodation to him, then the forged note was not a payment, and its amount might be recovered back from him on the original contract for goods sold. Ellis v. Wild, 6 Mass. R. 321.

Payment of a debt by a counterfeit bank note, is no payment, and the amount of the note may be recovered back, from the person paying it. Young v. Adams, 6 Mass. R. 182. See also Markle v. Hatfield, post.]

(87) East India Company v. Tritton, ante p. 72.

[The undertaking of the endorser of a note, is not a collateral undertaking to answer for the debt of another within the meaning of the statute of frauds. (*d*)

An endorsement is a new contract by the endorser with the endorsee. (*e*)

And therefore in an action by an endorsee against an endorser, it is no defence that the note as between the maker and payee, is void, or that the name of the maker or of a previous endorser is forged. (*f*)

So in an action against C., the endorser of a note signed "*A., by B. his attorney,*" it is no defence that A. was dead when B. signed it, the other parties being ignorant of his death. (*g*)

A note by which the maker promises A. to pay to the order of B., must be endorsed by B. before A. can bring an action on it in his own name. And if B. endorse such a note, he is liable on it to A. as endorser. (*h*)

The obligation of the endorser of a note, as such, is not diminished by the endorsee's giving him a receipt stating that on payment of the note the endorsee is to retain a certain sum, and pay the balance to the endorser, though the endorsee is bound by his receipt. (*i*)

Where A., being in possession of a note to which he was not a party, and which had not been endorsed by the payee, endorsed it to B. for a valuable consideration, it was held that B. could maintain no action against A. without proof of some special contract between A. and B. (*k*)

A person endorsing a bill or note for the accommodation of the drawer or maker, is liable to the holder in the same manner as any other endorser, although the holder when he re-

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[(*d*) Turnbull v. Trout, 1 Hall, 336.]

[(*e*) See Young v. Brian, 6 Wheat. R. 146.]

[(*f*) Codwise v. Gleason, 3 Day, 12; Olivier v. Andry, 7 Conn. R. 496.]

[(*g*) Burrill v. Smith, 7 Pick. 291. Parker C. J. in giving the opinion of the Court, says, "The endorser always warrants the existence and validity of the contract which he undertakes to assign."]

[(*h*) Willis v. Green, 10 Wend. 516.]

[(*i*) M'Carty v. Montet, 6 Louisiana R. 20.]

[(*k*) Birchard v. Bartlett, 14 Mass. R. 279.]

ceived the bill or note knew him to be merely an accommodation endorser. (*l*)

But if an endorsement specifies that there is to be no recourse to the endorser, or that it is at the risk of the endorsee, the endorser is not liable to any action by the endorsee. (*m*)

So the liability of the endorser may be varied by a written agreement of the endorsee ; (*n*)

But parol evidence is held to be inadmissible to vary the legal effect of an endorsement. (*o*)

As to show that at the time of the transfer the endorser agreed to be liable at all events, without any demand or notice. (*p*)

Yet where a person who had endorsed a note in blank was sued as endorser, it was held that he might prove by parol evidence that he was not to be liable as endorser, but merely put his name on the note to enable the plaintiff to collect the money of the maker. (*q*)

It is held that in an action against the endorser of a note, he may show that he received the note as the agent of the plaintiff or some one for whom the plaintiff acts, and that he endorsed the note to the plaintiff without assuming any responsibility. (*r*)

Where a person procures another to endorse a note for his accommodation, and becomes a subsequent endorser himself,

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[(*l*) Yeaton v. Bank of Alexandria, 5 Cranch, 49; Violett v. Patton, 5 Cranch, 142; Brown v. Mott, 7 Johns. R. 361; Bank of the U. States v. Weisiger, 2 Pet. S. C. R. 331.]

[(*m*) Rice v. Stearns, 3 Mass. R. 225; Welch v. Lindo, 7 Cranch, 159.]

[(*n*) In an action against the endorser of a note, the defendant offered in evidence a writing signed by the plaintiff acknowledging an agreement between them that the plaintiff should sue a special writ against the maker, and direct the officer to secure the debt if possible; it was held that the evidence was admissible; and that the defendant might prove that the maker of the note had land conveyed to him, while the execution upon the note was in force against him, which land might have been taken upon the execution. Phelps v. Foot, 1 Conn. R. 387.]

[(*o*) Fuller v. M'Donald, 8 Greenl. 213. Wright v. Latham, 3 Murphy, 298, is contra.]

[(*p*) Barry v. Morse, 3 N. H. R. 132.]

[(*q*) Johnson v. Martinus, 4 Halst. 144.]

[(*r*) M'Donough v. Goule, 8 La. R. 472.]

and pays the note when due, he can maintain no action against the accommodation endorser. (*s*)

The liability of the endorser of a bill or note is regulated by the law of the country where the endorsement is made. (*t*)

If several persons endorse a note, they are not joint sureties to the holder, but each one is severally liable to him, and they are liable to one another in the order of their respective endorsements; so that any later endorser may recover of any prior endorser, whatever he may have paid on the note to the holder (*u*)

The law is the same, whether the endorsers received the note successively from each other in the course of business, or they are merely accommodation endorsers for the benefit of another person. (*u*)

Therefore where the payee of a note and another person endorse a note for the accommodation of the maker, and the payee pays it, he can maintain no action for a contribution for any part of the money paid by him, against the second endorser. (*v*)

[(*s*) Whitwell v. Crehore, 8 La. R. 540.]

[(*t*) See ante, Chapter A.]

[(*u*) Church v. Barlow, 9 Pick. 547; M'Donald v. Magruder, 3 Pet. Sup. C. R. 470; Stone v. Vincent, 18 Martin, 517; Farmers' Bank v. Van Meter, 4 Rand. 553.

In Talcott v. Cogswell, 3 Day, 512, where the payee and another person had endorsed a note for the accommodation of the maker, and each had paid one half of the note to the holder, and some time after the second endorser sued the first to recover the moiety which he had paid, the Court thought the circumstances of the case furnished sufficient evidence that the endorsement was joint; but the jury found a verdict for the plaintiff,—and though sent by the Court to a second, and afterwards a third consideration, still adhered to their verdict.]

[(*v*) M'Donald v. Magruder, 3 Pet. Sup. C. R. 470; Hixon v. Reed, 2 Litt. 174; Farmers' Bank v. Van Meter, 4 Rand. 553.

It has, however, been held in Ohio, that the payee of a note and another person who endorsed it for the accommodation of the maker, were joint sureties; and that where the two endorsers had each paid one half of the amount due on the note, the second endorser could not recover of the first endorser the amount which he had paid. Douglass v. Waddle, 1 Hammond's Ohio R. 413.

In Tennessee also, accommodation endorsers for the maker are regarded as joint sureties; and therefore it is held there that a second endorser in such a case, paying a note, can only recover one half the amount of the first endorser. Daniel v. M'Rae, 2 Hawks. 590.]

If several persons give a power of attorney to another, to renew a note on which they are successive endorsers, he must put the names on the renewed note in the same order, otherwise it will not be a due execution of the power. (*w*)

But where the directors of a turnpike company were the maker and endorsers of a note, on which money was raised to pay the debts of the company, it was held, in the absence of any special agreement, that they were mutually responsible; and that if one paid the note, either voluntarily or by compulsion, he could call on the others for contribution. (*x*)

An endorser is discharged by the holder or his attorney's erasing his endorsement. (*y*)

Where the payee of a note assigned it, warranting that it was due, and the assignee sued the maker, it was held in Vermont that the payee, on receiving notice of the suit and of a defence set up by the maker, was bound to furnish the assignee with all the evidence in his power, in order to enable him to recover. (*z*)

An endorsement in blank of a note not negotiable, is an undertaking that it may be collected of the maker by using due diligence, which consists in demand on its becoming due, and in case of non-payment, the maker being solvent, of immediate suit with attachment, where it is allowed, followed by the most rigorous measures for collection. (*a*) (*b*)

But no suit is necessary where the maker is utterly insolvent. (*a*)

An assignment by the maker, of all his goods to the endorser, before the note is due or security given him by the maker against his endorsement, is a waiver by the endorser of diligence on the part of the holder. (*a*)

But an assignment of property to the endorser by the maker, as security against liabilities on account of the maker, made

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[(*w*) Bank of the State of South Carolina v. M'Willie, 4 M'Cord, 438.]
[(*x*) Slaymaker v. Gundacker's Ex'rs., 10 Serg. & Rawl. 75.]
[(*y*) Smith v. M'Lean, 2 Taylor's R. 72.]
[(*z*) Warner v. M'Gary, 4 Verm. R. 507.]
[(*a*) Prentiss v. Danielson, 5 Conn. R. 175.]
[(*b*) Huntington v. Harvey, 4 Conn. R. 124.]

after the endorser is discharged by laches of the holder, he being under other liabilities equal to the amount of property conveyed, will not be a waiver of legal diligence on the part of the holder, and revive the liability of the endorser. (*a*)

An endorsement of a note to the maker extinguishes it, and it cannot be revived by his endorsing it to another person. But such an endorsement by the maker, if made for a good consideration, would create a new obligation on him. (*c*)]

[(*c*) Long v. Bank of Cynthiana, 1 Litt. 290. The declaration in this case, which was brought by the Bank of Cynthiana, against Long and Robertson, alleged the making of a note by the defendants, payable to William Brown, Brown's endorsement to Frazier, Frazier's to Moore, Moore's to the defendants, and the defendants' endorsement to the bank. The defendants demurred to the declaration; and the Court of Appeals of Kentucky sustained the demurrer, and said "The endorsement of the note to the defendants must operate as an extinguishment of their obligation to pay it; for by the endorsement to them, they became its proprietors, and they could not be bound to themselves. Nor could the obligation thus extinguished be resuscitated by the endorsement and delivery of the note by them to the bank, for, in general, when an obligation is once extinguished, it cannot be revived. The endorsement to the bank in this case no doubt did create a new obligation upon the defendants." But the Court thought that if it should appear that the name of the defendants was put on the note, not as an endorsement, but for some other purpose, the plaintiff might have leave to amend the declaration.]

CHAP. VI.

Sect. 1. *Of the Acceptance of Bills or Notes.*

By whom. Drawee.
——————— *for Honor.*
——————— *one of several Drawees not Partners.*
——————— *one of several Partners.*
——————— *a Servant.*
When.
On the Bill.
Not on the Bill.
By keeping or destroying the Bill.
Conditional or absolute.
According to or varying from the Tenor.
——————————— *as to the Place.*
What Holder may require.
Rejection of—what shall be.
Alteration of.
Revocation of.
Waiver of.
——— *by Indulgence to the Drawer or other Parties.*
——— *in Cases of Accommodation Acceptances.*

The doctrine of acceptances applies chiefly to bills; for a note may (1) in general be considered, on comparison with a bill, as accepted when it issues.

But on notes payable a limited time after sight, an acceptance is necessary to fix the time of their becoming due. (2)

An acceptance is an engagement to pay a bill according to the tenor of the acceptance; and a general acceptance is an engagement to pay according to the tenor of the bill.

This engagement is made by the drawee of the bill or

(1) D. acc. 2 Bl. Comm. 470.

some (3) other person, to the (4) drawer or some of the other parties; and might heretofore have been made upon any bill

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(3) Mutford v. Walcott, Lord Raym. 575. 12 Mod. 410. Com. 76. per Holt C. J. "If A. draws a bill on B., and B. will not accept, and C. offers to accept for the honor of the drawer, the holder need not acquiesce, but if he does, C. is bound." And per Lord Mansfield and Yates J. in Pillans v. Van Mierop, Burr. 1672. 1674., "an acceptance for the honor of the drawer will bind the acceptor."

(4) Pillans and another v. Van Mierop, Burr. 1663. White drew on the plaintiffs at Rotterdam for 800*l*., and proposed to give them credit upon the defendants' house in London; the plaintiffs paid White's bill, and wrote to the defendants to know, "Whether they would accept such bills as they, the plaintiffs, should draw in about a month upon them for 800*l*. on White's credit." The defendants answered, that they would, but, White having failed before the month elapsed, the defendants wrote to the plaintiffs not to draw. The plaintiffs did however draw, [qu. whether plaintiffs had not previously given credit upon the faith of the defendants' answer before the letter not to draw arrived?] and on the defendants' refusal to pay the bills, brought this action. The jury found a verdict for the defendants; but upon an application for a new trial, as upon a verdict against evidence, and two arguments upon it, the Court was unanimous that the defendants' letter was a virtual acceptance of such bills as the plaintiffs should draw to the amount of 800*l*. and the rule was made absolute. See Johnson v. Collings, post.

Pierson v. Dunlop and others, Cowp. 571. M'Lintot drew upon the defendants in favor of Nicholl, and gave Nicholl a navy bill assigned to the defendants as a security till the bill of exchange should be accepted; both bills were sent by Nicholl to the defendants, who said, the bill of exchange would not be accepted till the navy bill was paid, but they would receive the money on the navy bill; and they wrote to M'Lintot, saying his bill would receive due honor, but it was drawn too short, being payable before the navy bill: they afterwards received the money on the navy bill, but refused to pay the bill of exchange, upon which this action was brought: the plaintiff obtained a verdict, but the defendants had a rule to show cause why there should not be a new trial, and insisted that the letter to M'Lintot, upon which the jury had in some measure relied, was no acceptance; but on cause shown, Lord Mansfield said, "I consider what the defendants did as an acceptance; it has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by endorsement. If there are any such circumstances, it may amount to an acceptance, though contained in a letter to the drawer; in this case, there is great reason to say, that what the defendants did was equivalent to an acceptance: there may be a conditional as well as an absolute acceptance; what then is the declaration by the defendants, but an undertaking that the bill should be accepted when the navy bill was paid? afterwards he writes this letter, which is an admission he looked to the navy bill as the fund out of which the bill of exchange was to be paid." A new trial was refused.

Mason v. Hunt, Dougl. 284. 297. Rowland Hunt, in Dominica, wrote

foreign or inland, before the (5) bill was drawn or (6) afterwards, and either verbally (7) or in writing: but now by 1 & 2

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a letter to his partner, Thomas Hunt, in London, stating that he had agreed that Thomas should accept bills for 3600*l.* upon certain conditions; it was doubtful whether those conditions had been performed, but at all events it was clear that the obligation created by this letter was waived; an action was however brought against the Hunts, and after a verdict for the defendants, and an application for a new trial, upon which the Court took time to consider, Lord Mansfield said, "There is no doubt but an agreement to accept may amount to an acceptance, and it may be couched in such terms as to put a third person in a better situation than the drawer."

Powell v. Monnier, 1 Atk. 611. Newburgh drew upon Monnier for 50*l.* and sent him a letter of advice, and Monnier wrote for answer that the bill should "be duly honored and placed to Newburgh's debit." A bill in Chancery was afterwards filed against Monnier's executrix, upon the ground that this letter amounted to an acceptance; and Lord Hardwicke thought it clear that it did, and decreed payment. See Wynne v. Raikes, post, n. (36).

[It is well settled in the United States that an acceptance may be made before the bill is drawn. See Wilson v. Clements, Storer v. Logan, M'Evers v. Mason, Goodrich v. Gordon, and Coolidge v. Payson, post.]

(5) Vide Pillans v. Van Mierop, and Mason v. Hunt, ante, p. 155. But see also Johnson v. Collings, post.

(6) Vide Powell v. Monnier, supra.

(7) Cox v. Coleman, M. 6 Geo. 2. cited arguendo Ann. 75. A foreign bill drawn on defendant was protested for non-acceptance and returned, and afterwards defendant told the plaintiff, "If the bill comes back, I will pay it:" and this was held a good acceptance.

Lumley v. Palmer, Str. 1000. Ann. 74. In an action against the defendant as acceptor of a bill, the acceptance appeared to be by parol only, which Lord Hardwicke C. J. ruled to be sufficient; but Eyre C. J. of Common Pleas, having ruled it otherwise in Rex v. Meggott, H. 7 Geo. 2. because of the proviso in 3 & 4 Ann. c. 9. s. 5. "that no acceptance of any inland bill shall be sufficient to charge any person whatsoever, unless the same be under-written or endorsed in writing thereupon," an application was made for a new trial, and the Court, to settle the point, ordered it to be argued; upon the argument the Court held Lord Hardwicke's direction right, on the ground that the statute of Anne was intended to give a holder additional remedies, not to deprive him of any he before had; and Eyre C. J. waived his opinion, and agreed with the Court of King's Bench; and this determination is referred to and approved of in Julian v. Shobrooke, 2 Wils. 9. Powell v. Monnier, 1 Atk. 612; and in Pillans v. Van Mierop, Burr 1662, Lord Mansfield says, "A verbal acceptance is binding;" and in Sproat v. Matthews, 1 Term. Rep. 182, it was taken for granted by the Court and bar that a parol acceptance was good. See also Str. 817.

[Ridgway and Balch drew on Shaw, he refused to accept; and the bill was protested for non-acceptance, and at maturity for non-payment. Afterwards on receiving bills of lading of a consignment from Ridgway and Balch, he called on Gilbert and Dean, who held the bill and

Geo. 4. c. 78. s. 2, which operates from 1st August, 1821, every acceptance of an inland bill must be in writing upon the bill, or, if there be several parts of the bill, on one of such parts. (8)

An acceptance is also either absolute or (9) conditional, and either according to, or (10) varying from, the tenor of the bill.

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offered to pay it. They said it had been returned to Philadelphia. He then said that if they would send for it, he would pay it. When the bill was again presented to him, he refused to pay it, having been in the mean time summoned as trustee of Ridgway and Balch. Parker C. J. delivered the opinion of the Court. "The defendant promised Gilbert and Dean, if they would get the bill back, he would accept and pay it; and they obtained the bill. This promise was binding on him." And on the ground of Shaw's liability as acceptor, he was discharged as trustee. Grant v. Shaw, 16 Mass. R. 341.]

(8) By 1 & 2 Geo. 4. c. 78. s. 2. After 1st August, 1821, no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill; or, if there be more than one part of such bill, on one of the said parts.

(9) Smith v. Abbott, Str. 1152. Defendant accepted a bill "to pay when goods consigned to him were sold;" he sold the goods, and on being sued upon his acceptance, insisted in arrest of judgment that it was not binding, because it was conditional; but the Court, on consideration, held, that though the plaintiff might have refused to take it, and have protested the bill, yet as he did take it, it was binding on the defendant.

Julian v. Shobrooke, 2 Wils. 9. The defendant accepted a bill to pay, "when in cash for the cargo of the ship Thetis;" and on being sued, moved in arrest of judgment that a conditional acceptance was not good; but the Court held otherwise, and overruled the objection.

Pierson v. Dunlop, Cowp. 571. antè, p. 155. An answer that the bill would not be accepted till a navy bill was paid, was held a conditional acceptance, to pay when the navy bill should be discharged.

(10) Wegersloffe v. Keene, Str. 214. A foreign bill for 127*l.* 18*s.* 4*d.* was drawn on the defendant, and he accepted it to pay 100*l.* part thereof; he was sued upon this acceptance, and on demurrer to the replication, insisted that a partial acceptance was not good within the custom of merchants; but the Court held otherwise, and judgment was given for the plaintiff.

Walker v. Atwood, 11 Mod. 190. A bill was drawn on the defendant 8th of April, and no time fixed for its payment; it was presented to defendant 18th of April, and he accepted it to pay 8th of September; this being stated in the declaration, the defendant demurred, and insisted that as no time was prescribed for the payment, the bill was payable at sight, and then a promise to pay two or three months after sight was not an acceptance within the custom of merchants; but the Court held it was an acceptance within the custom, and the demurrer was overruled.

An acceptance is seldom made, before the bill is drawn, by any other person than the drawee; afterwards, for the purpose either of promoting the negotiation of a bill where the drawee's credit is suspected, or to save the reputation and prevent the suing of some of the parties where the drawee either cannot be found, is not capable of making himself responsible, or refuses acceptance, an acceptance by a stranger is not uncommon; and it is called an acceptance for the honor of the (11) person on whose account it is made, and enures to the benefit of all the parties subsequent to that person.

Acceptances for honor are sometimes made on account of the person in possession of the bill at the time they are made, and sometimes on account of the drawer.

Acceptances for honor may be made by the drawee, or any other person. Thus, if a bill be drawn by A. on account of B., and the drawee be unwilling to accept on account of B., he (12) may accept for the honor of A. and on his account.

So the drawee may accept for the honor of an endorser, [and on payment of the bill can sue the endorser or any of the prior parties. (*a*)]

But the drawee, if bound to honor the bill as drawee, can acquire no rights as holder of the bill by accepting and paying it, *supra protest.* (*a*)]

And if the drawee refuse acceptance, or if he accept and afterwards abscond, or (13) become bankrupt, any other person may accept for the honor of the drawer or of an endorser.

But after a general acceptance by the drawee, another per-

Petit v. Benson, Comb. 452. A bill was accepted to be paid half in money and half in bills: and the question was, whether there could be a qualification of an acceptance; and it was proved by divers merchants that there might, for he that might refuse the bill totally might accept it in part; but that the holder was not bound to acquiesce in such acceptance.

(11) Vide Lutw. 899. Beawes, s. 34. 1st ed. p. 418. s. 40. 42. 2d ed. p. 419.

(12) Beawes, s. 33. 2d ed. p. 421. Marius, 21.]

[(*a*) Schimmelpennich v. Bayard, 1 Pet. Sup. C. R. 264.]

(13) See exparte Wackerbarth, 5 Ves. 574. and infrà, n. (16).

son (14) cannot make a second acceptance in order to guaranty the acceptor's credit.

If, however, such second acceptance be written on the bill, the party for whose benefit it is made (15) may sue the person who made it, as upon a collateral undertaking to guaranty the payment of the bill, if it have the stamp proper for such an undertaking.

A person who accepts for honor, is only liable if the original drawee do not pay. (15)

And to charge such acceptor, there must be a presentment for payment to such original drawee. (15.)

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(14) Jackson v. Hudson, 2 Camp. N. P. C. 447. Action on a bill drawn by the plaintiff on I. Irving, and accepted by him; and under his acceptance the defendant wrote "accepted, Jos. Hudson. Payable at, &c." The defendant was sued as acceptor. The plaintiff offered to prove that he had had dealings with Irving, and had refused to trust him further, unless the defendant would become his surety; and that the defendant, in order to guaranty Irving's credit, wrote this acceptance on the bill. Lord Ellenborough said, that this was neither an acceptance by the drawee, nor by a person for the honor of the drawer; but that it was a collateral undertaking that the bill should be paid, and ought to have been declared upon as such. Nonsuit.

It seems, however, that after an acceptance supra protest for the honor of one party, there may be a similar acceptance for the honor of another. Beawes, s. 72. 2d ed. p. 422.

(15) Hoare v. Cazenove, 16 East, 391. A foreign bill was drawn on Penn & Hanbury; they refused acceptance, and it was protested for non-acceptance. Defendant accepted it for the honor of the first endorsers; but did not pay: action indè: defence, that it had not been presented for payment when due, to Penn & Hanbury, nor protested for non-payment by them: and on case and time to consider, the Court held such presentment and protest essential; because, they considered defendant's acceptance as conditional, if Penn & Hanbury did not pay; and Penn & Hanbury might have funds when the bill became due, though they had none before.

Williams v. Germaine the elder, 7 Barn. & Cr. 468. The declaration stated that George Germaine drew a bill at 30 days sight, at Sierra Leone, upon Pugh and Redman, London; that Pugh and Redman refused to accept, and it was protested for non-acceptance; that thereupon defendant, to prevent the bill from being sent back and returned, did, under the said protest, accept the said bill in writing, and subscribed the said acceptance on the said bill, and then and there made the said bill payable at a certain place by the description of No. 6, Union Court, Old Broad Street; that the bill when due was presented at the said place, and payment demanded, but payment was not made, by reason whereof defendant became liable and promised; after judgment by default, rule nisi in arrest of judgment, on the ground that there was no allegation of presentment for payment to Pugh and Redman; and on cause shown, and time to consider, the Court thought them-

[If a bill drawn on a party who resides in one place, payable in another, after being protested for non-acceptance, be accepted for the honor of an endorser, "if regularly protested and refused when due,"—in order to charge the acceptor for honor a presentment at the residence of the drawee, and protest there is the proper course. (*b*)

In order to charge the drawer of the bill accepted for honor, there must be a presentment for payment to the original drawee, and notice to the drawer. (*c*)]

If the acceptor for honor pay, he is (16) entitled to have recourse for repayment to the person for whose honor he made

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selves bound by Hoare and Cazenove to consider such an allegation essential; and Lord Tenterden intimated a strong opinion, that without that authority he should have been of a similar opinion, on the ground that an acceptance for honor is only an undertaking to pay if the original drawee do not. R. A.

Williams v. Germaine the younger, 7 Barn. & Cr. 468. Michaelmas, 1827. This was an action on the same bill against the drawer, and for want of a similar allegation of a presentment for payment to Pugh and Redman, the judgment was arrested.

N. There was no distinct averment of Pugh and Redman's refusal to accept.

In Brunetti v. Lewin, Lutw. 896. The declaration, after setting out the custom, stated the facts as follows:—Valentine in London drew on Abandano at Leghorn, payable to defendant's order. Abandano refused to accept, and the bills were protested for non-acceptance, whereof defendant had notice, and thereupon defendant accepted for the honor of the drawer, and promised to pay "on the return thereof." Plaintiff endorsed the bill, and after several endorsements, it was presented to Abandano for payment, but payment was refused. The bill was protested for non-payment and returned to plaintiff, whereof defendant had notice, and defendant had sight of the bill, and promised to pay.

[(*b*) Mitchell v. Baring, 10 B. & C. 4.]

[(*c*) Schofield v. Bayard, 3 Wend. 488.]

(16) Beawes, s. 47. 49. 2d ed. p. 422. and see exparte Wackerbarth, 5 Ves. 574. The acceptor of a bill having become bankrupt, and the holders having protested it for better security, Christen and Bowen accepted it for the honor of the drawers; and having paid it, now claimed to be entitled to dividends out of the bankrupt's estate. The chancellor said, that he had spoken to persons in trade on the subject, and that the result was, that the person accepting for the honor of the drawer had a right to come upon the acceptor. He said, however, that the justice of the case required that they should go in the first place against the drawer, if the acceptor had no effects, and directed an inquiry to be made whether the original acceptor or Christen and Bowen had effects of the drawer's in hand. [But if the original acceptor were not liable to the drawer, he will not be liable to the acceptor for honor. See Exparte Lambert, 13 Ves. 179.]

the acceptance, and to all other parties who are liable to that person.

[Where a bill is protested for non-acceptance by the drawee, who has no funds of the drawer, and is under no obligation to honor the bill, and another person at the request of the drawee, accepts it *supra protest*, for the honor of an endorser, the drawee guarantying the acceptor *supra protest*, the latter, on paying the bill, may have recourse to the endorser or any prior party. (*d*)

But the endorser in an action against him by the person paying the bill, may avail himself of every defence that he would have had against the drawee. (*d*)

A bill was accepted *supra protest* for the honor of an endorser, the acceptance containing an agreement to pay any person authorized to receive the money and to give a discharge. It was held that the acceptor for honor was not bound to pay without the holder putting his name on the bill, or giving a bond of indemnity instead, which the acceptor offered to receive. (*e*)]

An acceptance of this description is not made on a foreign bill until after a (17) protest (either for non-acceptance, or where the acceptor absconds or becomes bankrupt for want of better security), and from this circumstance it is called an acceptance *supra protest*.

If a bill be drawn on several partners, an acceptance by one, though in his own name only, will bind (18) all; but if drawn on several persons not connected in partnership, an acceptance by one will bind him, but him (18) only.

If an acceptance by one of several partners be a fraud on the others; or if the one have no authority to bind the others by accepting bills; a person who is (19) privy to such fraud or who (19) has received notice of such want of authority'

[(*d*) Konig v. Bayard, 1 Pet. Sup. C. R. 250.]
[(*e*) Freeman v. Perot, 2 Wash. C. C. R. 485.]
(17) Beawes, 2d ed. p. 421. Marius, p. 21. See Evans on Bills of Exchange, p. 35.
(18) See antè, p. 50, note (22).
(19) See antè, c. 2. p. 55 to 58.

cannot, by taking such acceptance, acquire a right to sue the partnership.

[If a bill be drawn on A. & Co. an old firm not existing at the time the bill is drawn, be accepted by A. & B., all the partners in the firm of A. & B. will be bound by the acceptance. (*f*)]

On a bill drawn upon a man by the description of "servant," a general acceptance will (20) bind him personally.

An acceptance after the bill is drawn may be made even after (21) the time appointed for its payment.

In such case an acceptance to pay according to the tenor, will (22) be considered as a general acceptance to pay upon demand.

Upon the acceptance of a bill payable at a given time after sight, if the words of acceptance and the date be in one handwriting, and the drawee's name under it in the drawee's, the presumption is that the words of acceptance and the date were either upon the bill when he signed his name, or put there afterwards with his consent; because, that is the usual course. (23)

[(*f*) Lloyd v. Ashby, 2 Bar. & Adolph. 23. A bill drawn on Ashby & Co., which firm had consisted of Ashby, Rowland, and Osborne, but did not exist when the bill was drawn, was accepted by Rowland in the following form: "Accepted, Ashby & Rowland, at Messrs. Vere, Ward, & Co." The firm of Ashby & Rowland consisted of Ashby, Rowland, and Shaw; Shaw being a secret partner. It was held these three persons were liable on the acceptance.]

(20) See Thomas v. Bishop, antè, p. 70.

(21) Jackson v. Piggot, Lord Raym. 364. Salk. 127. Carth. 450. 12 Mod. 212. In an action against the acceptor of a bill, the declaration stated, that it was dated 25th March, 1696, payable one month after date, and that in April, 1697, it was shown to the defendant, and he promised to pay it according to its tenor and effect; after verdict for the plaintiff, it was moved in arrest of judgment, that the promise was void, because as the day of payment was past at the time of the acceptance, it was impossible to pay the bill according to its tenor and effect; but it was answered for the plaintiff, that it amounted to a promise to pay generally; and of that opinion was the Court, and they accordingly gave judgment for the plaintiff.

Mutford v. Walcot, Lord Raym. 574. Salk. 129. 12 Mod. 410. Com. 75. is precisely to the same effect. [See also Grant v. Shaw, antè, p. 156.]

(22) Vide Jackson v. Piggot, and Mutford v. Walcot, suprà.

(23) Glossop v. Jacob, 4 Campb. 227. 1 Stark. 70. Action against

A written acceptance is either made upon the bill or (24) elsewhere.

On a written acceptance by the drawee, his name need not appear; and any words written by him upon the bill, not putting a direct negative upon its request, as "accepted," (25) "presented," "seen," (25) "the day of the month," or a (26) direction to a third person to pay it, is primâ facie a complete acceptance.

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acceptor on bill payable sixty days after sight; the acceptance was "Accepted, 25th October, 1814. B. Jacob." The signature only was Jacob's; whose the other words were did not appear; but it was proved to be usual for a clerk to write "accepted," and the date, and for the drawee then to subscribe his name; and Lord Ellenborough, on objection, said he should leave it to the jury to presume the words were written with defendant's privity when he accepted the bill, unless defendant could give some other date to the transaction. The jury presumed accordingly, and verdict for plaintiff.

(24) Vide Pillans v. Van Mierop, Mason v. Hunt, Powell v. Monnier, and Pierson v. Dunlop, antè, p. 155, 156, 157.

(25) Anon. Comb. 401. per Holt, C. J. If the drawee underwrites a bill "presented such a day, or only the day of the month," it is such an acknowledgment of the bill as amounts to an acceptance; and this was declared by the jury to be the common practice.

Powell v. Monnier, 1 Atk. 611. A bill was sent by the post to the drawee for acceptance; he entered it in his bill-book (which was his practice with all bills he received whether he meant to accept them or not), wrote upon it the number of the entry, and kept it ten days; on the tenth he wrote upon it the day of the month, and returned it, saying he could not accept it: and per Lord Hardwicke, "It has been said to be the custom of merchants, that if a man underwrites any thing, be it what it may, it amounts to an acceptance; but if there were nothing more than this in the case, I should think it of little avail to charge the defendant;" but he decided that a letter the drawee had written amounted to an acceptance. Vide antè, p. 157.

[Dufour v. Oxenden, 1 M. & Rob. 90. Action against the defendant as acceptor of a bill. The drawee wrote on the face of the bill "*Accepted*," but did not sign his name. It was held to be a question for the jury whether this was intended as an acceptance. Patteson J. said, "It is very improbable that it was not so intended." Verdict for the plaintiff.]

(26) Moor v. Whitby, B. R. Tr. 10 Geo. 3. Bull. Ni. Pri. 270. A bill drawn by Newton on Whitby, was presented for acceptance, and Whitby wrote upon it "Mr. Jackson, please to pay this note, and place it to Mr. Newton's account. R. Whitby." It was insisted that this was no acceptance, but merely a direction to Jackson to pay it out of a particular fund, and if there was no fund there was to be no payment; sed per Cur. "this is a direction to Jackson to pay the money, and it signifies not to what account it is to be placed; that is between Jackson and Whitby only, this is clearly an acceptance."

It has indeed been said (27), that an express refusal to accept, written on a bill, is an acceptance; but this is not the case, unless it be accompanied with a conduct showing an intent to create a belief that it is accepted.

On a written acceptance on the bill by any other person than the drawee, it should seem essential that his name should appear.

A promise to accept an existing bill if made upon an (28) executed consideration, or if it (29) influence any person to take or retain the bill, is, where 1 & 2 Geo. 4. c. 78. s. 2. does

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(27) In Ann. 75. is this note:—Underwriting or endorsing a bill thus, 'I will not accept this bill,' is held by the custom of merchants a good acceptance;" but by Lord Mansfield in Peach v. Kay, in sittings after Trinity Term, 1781, "it was held by all the Judges that an express refusal to accept, written on the bill, where the drawee apprised the party who took it away what he had written, was no acceptance; but if the drawee had intended it as a surprise upon the party, and to make him consider it as an acceptance, they seemed to think it might have been otherwise."

(28) Vide Pillans v. Van Mierop, ante, p. 155.

(29) Vide Pierson v. Dunlop, and Mason v. Hunt, ante, p. 155.

Clarke and others v. Cock, 4 East's Rep. 57. Woodward authorized the defendant to receive certain African bills, of which he sent him a list, and apprised him that he had drawn upon him for the amount. The defendant, by letter, acknowledged the receipt of the list, and assured Woodward that the bills he had drawn on him "should meet with due honor." The plaintiffs, who were Woodward's bankers, and greatly in advance to him, having refused to give him further credit, he endorsed to them the bills which he had so drawn upon the defendant, and at the same time either communicated the purport of the defendant's letter or else represented his having made an absolute promise to accept, but did not show the letter itself; and the plaintiffs, on the faith of defendant's promise, advanced to Woodward the full amount of the bills. The defendant afterwards wrote to Woodward that the African bills had been attached, and Woodward in answer, desired them to refuse acceptance of the bills drawn on him. The defendant did in fact receive the amount of the African bills before the bills drawn on him became due; but this amount was afterwards attached in his hands, and upon that attachment he paid over the money so received. This action was brought against the defendant as acceptor of the bills drawn by Woodward; a verdict was found for the plaintiffs, subject to the opinion of the Court. The Court held that this was a good acceptance, and that the subsequent circumstances had not done it away; and therefore awarded the postea to the plaintiff. Lawrence J. said the defendant might have resisted the attachment on the ground of his acceptances, which would have been a defence to him.

[The doctrine stated in the text is recognised by the Court in M'Evers v. Mason, 10 Johns. R. 207.]

not apply, a complete acceptance as to the person to whom the promise is made in the one case, and as to the person influenced in the other, and as to all the subsequent parties in each.

A promise by the drawee to the person who ought to provide funds for the payment of a bill, and who actually furnishes them to the drawee, that the drawee will apply such funds to that purpose, is, where 1 & 2 Geo. 4. does not apply, a sufficient acceptance; though the bill be in the hands of an endorsee, and the action upon it be brought by such endorsee. (30).

At least, if the person to whom such promise was made were the drawer of the bill, or (30) identified with the drawer.

But a promise to accept a bill to be afterwards drawn, is (31)

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(30) Fairlee v. Herring, 3 Bingh. 625. Mornay, and, under him, Exter, were agents in Mexico for defendants. Exter, under the direction of Mornay and with the approbation of defendants, drew in Mexico on defendants for 11,458*l.*, in favor of Herrera and Richie or order; and plaintiffs were endorsees. Defendants assigned to the Mexican Mining Association the concern on account of which these bills were drawn, and the Mexican Company was to pay them; but Powles, one of the defendants, requested Mornay, who now acted for the Mexican Company, to furnish defendants with the 11,458*l.*, as it would be unpleasant for defendants to have bills drawn on them paid by another house; and it was agreed between Powles and Mornay that defendants should have the money for the specific purpose of paying the bills. The bills were afterwards left with defendants for acceptance, but they declined accepting. Herring, another of the defendants, on being told of the non-acceptance, said, "What! not accepted! we have had the money, and they ought to be paid. But I don't interfere in this business; you should see Mr. Powles." Plaintiffs, in ignorance of these facts, protested the bills for non-acceptance, but afterwards sued defendants as acceptors. A case being reserved, the question was, Whether, upon what had passed between defendants and Mornay, plaintiffs were entitled to treat defendants as having accepted the bills? It was objected that plaintiffs could take no advantage of what had passed between defendants and Mornay, Mornay not being a party to the bills; and that at all events, plaintiffs having protested the bills for non-acceptance, could not now say they were accepted. But the Court held, that Mornay was identified with Exter the drawer; that the promise made by Powles to him was therefore a valid acceptance, and enured to the benefit of every body whose name was on the bills; and that plaintiffs could not be prejudiced by the protest made by them in ignorance of their right. Judgment for plaintiffs.

(31) Johnson v. Collings, 1 East's Rep. 98. Collings owed Ruff 23*l.* 10*s.* 6*d.* Ruff applied for payment, and Collings said that if Ruff would draw for it at two months he would pay it. Ruff drew accordingly, and endorsed the bill to the plaintiff, but did not mention to him

no acceptance of the bill when drawn unless some person be thereby (32) induced to take or retain the bill; and indeed it may be doubted, whether in any case, a promise to accept a non-existing bill, would (33) now be considered as an acceptance of the bill when drawn. (*g*)

And a promise to accept, made upon an executory consideration, is in no case (34) binding so long as such considera-

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Collings's promise. The plaintiff sued Collings, on the ground, that his promise to Ruff was virtually an acceptance. But Le Blanc J. thought that as it was not made to a third person, nor with circumstances which might induce a third person to take the bill, it was no acceptance, and nonsuited the plaintiff. On a rule nisi for a new trial, and cause shown, the whole Court thought it no acceptance: and Lord Kenyon thought that the admitting a promise to accept, made before the existence of the bill, to operate as an actual acceptance of it afterwards, even though a third person were thereby induced to take the bill, was carrying the doctrine of implied acceptances to the utmost verge of the law, and he doubted whether it did not go beyond the proper boundary. Rule discharged.

[Mason, Hodgson, & Co. were sued as acceptors of a bill. The evidence to support the acceptance consisted of letters written by the defendants to Proctor, their agent, before the bill was drawn, in one of which they agree to allow Proctor a commission upon all consignments of produce to them, and state that they "advance in anticipation of property on the receipt of bills of lading and invoices, with orders to insure, from 2-3 to 3-4 the probable proceeds;" and that he may "confidently assure any shippers that their drafts under the above circumstances will meet honor." The bill was drawn by Jephson on account of a shipment made by him to the defendants on the recommendation of Proctor, and he had forwarded bills of lading and invoices with orders to insure, and the bill drawn was for less than two thirds of the probable proceeds. The bill at the request of the drawer was made payable to Proctor, and by him endorsed. But it did not appear that the plaintiff purchased the bill, or that the drawer drew it, on the credit of the letter, or that either of them had any knowledge of it. The Court held, that even if an endorsee could in any case avail himself of such a promise as amounting to an acceptance, yet he could not in this case, as the bill was not taken upon the credit of the promise contained in the letter. M'Evers v. Mason, 10 Johns. R. 207.]

(32) Vide Pierson v. Dunlop, and Mason v. Hunt, ante, p. 155, and Johnson v. Collings, supra.

(33) Vide Johnson v. Collings, ante, p. 165, n. (31).

[(*g*) But it is clear that the person promising to accept bills to be drawn, if he refuse to accept them when drawn, is liable in damages for a breach of contract to the party to whom the promise is made. Laing v. Barclay, 1 Barn. & Cress. 398; S. C. 2 Dow. & Ryl. 530. See also M'Evers v. Mason, 10 Johns. R. 215.]

(34) In Pillans v. Van Mierop, ante p. 155 n. (4), Burr. 1666, Lord Mansfield says, "It was argued upon at the trial, that this imported to be a credit given to the plaintiffs in prospect of a *future* credit to be

tion remains executory, unless it influence some person to take and retain the bill.

[But a promise to accept a bill to be drawn, is binding on the person making it, if the person to whom it is made takes the bill on the credit of such promise. (*h*)

Thus, where A. verbally promised B. that A. & Co. would honor, accept, or pay bills drawn by C. to a certain amount, and B., within a reasonable time, upon the credit of this promise, purchased two bills drawn by C. on A. & Co. to the specified amount, it was held that A. was liable to B. on this promise, to the amount of the bills, they having been dishonored. (*h*)

It was also held, that it made no difference in regard to A.'s liability whether the purchase was made before or after the drawing of the bills, or whether they were drawn to pay a pre-existing debt, or drawn and sold for any other good and valuable consideration: (*h*)

And also that A. was liable, although B. knew that A. had no funds of C.'s in his hands at the time of making the promise to accept, and that he made the promise under the expectation of receiving such funds, and did not in fact receive them. (*h*)

It was also held to be no objection to A.'s liability that the object of taking the bill was to pay a partnership debt of B. & C., who had at a former time been partners, and that it was passed to a creditor of the partnership, who subsequently returned it for the dishonor, B. having, upon the dissolution, undertaken to discharge the partnership debts, and on the faith of A.'s promise having given up partnership property to the amount of the bill to C.; (*h*)

And that it was no objection to A.'s liability that the partnership accounts of B. & C. were unsettled, or that B. had agreed with C., in case both the bills should not be accepted, to assist him with funds to take up the non-accepted bill at maturity. (*h*)

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given by them to White; and this credit might well be countermanded before the advancement of any money; AND THIS IS SO."

[(*h*) Townsley v. Sumrall, 2 Pet. Sup. C. R. 170.]

The doctrine may be considered as established in the United States, that a written promise to accept a non-existing bill, is binding as an acceptance, if the holder of the bill receives it upon the credit of such promise. (*i*)

Although the holder receives the bill from the drawer in payment of a pre-existing debt. (*i*)

But such promise is not binding as an acceptance, unless the bill is drawn within a reasonable time after the promise is

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[(*i*) Goodwin, one of the owners of the sloop Hope, wrote a letter of instructions to Napier the master, previous to a voyage, in which he said, "Should you unfortunately be captured by an English cruiser, you will endeavor to ransom the vessel and cargo, as low as possible, say not to exceed two thousand dollars: your draft on me or my brother will be duly honored." The vessel being captured, the master, for her ransom drew a bill on Gordon for $2000, payable to Stewart or order, and gave Stewart the letter of instructions, and the vessel was released. Goodrich & Deforest, as endorsees of Stewart, brought an action against Gordon as acceptor. They had received the letter of instructions at the same time with the bills. Thompson C. J. delivered the opinion of the Court. "The testimony is very full to show that the letter of the defendant authorizing the drawing of the bill accompanied it at all times, and that it was upon the credit of that letter that the bill was taken by the plaintiffs. It was an authority given for the express purpose of enabling the captain to draw the bill, which was an act done for the benefit of the defendant, and according to his instructions; and I think it binding upon him as an acceptance; and this is the opinion of the Court." Goodrich v. Goodwin, 15 Johns. R. 6.

Coolidge & Co. wrote to Cornthwaite & Cary, saying, "If Mr. Williams feels satisfied on this point," (referring to a bond given by Cornthwaite & Cary to Coolidge & Co.) "he will inform you, and in that case your draft for $2000 will be honored." Cornthwaite & Cary gave Payson & Co. a bill for $2000 on Coolidge & Co., and Payson & Co. after ascertaining from Williams that he was satisfied with the bond, received the bill in payment of a pre-existing debt from Cornthwaite & Cary, upon the faith of the above letter. Payson & Co. sued Coolidge & Co. as acceptors of the bill. Marshall C. J. delivered the opinion of the Court. "Upon a review of the cases which are reported, this Court is of opinion, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise. This is such a case." "The mere circumstance that the bill was taken for a pre-existing debt has not been thought sufficient to do away the effect of a promise to accept." Coolidge v. Payson, 2 Wheat. 66, affirming the judgment of the Circuit Court, which appears in 2 Gallis. 233, Payson v. Coolidge. See also Storer v. Logan, infra, and Parker v. Greele, p. 171.]

made; and unless it describe it in terms not to be mistaken. (*k*)

And where a bill was drawn two years after the promise was made, in order to procure the drawer's release from arrest, the person making the promise was held not to be bound as acceptor. (*k*)

A letter agreeing in unqualified terms to accept a non-existing bill, is not binding on the writer as an absolute acceptance, where the holder of the bill is informed at the time of receiving it, that the acceptance depends upon a certain specified contingency. (*l*)

[(*k*) See Coolidge v. Payson, supra.

Hinckley having expressed dissatisfaction with a settlement of accounts between him and Clements, the latter wrote the former a letter containing the following words, "Reperuse the accounts, make out a statement according to your own wishes, and draw upon me here for the balance, which shall be punctually honored." Two years after this letter was written, Hinckley, being arrested by Wilson, a creditor, drew a bill on Clements in favor of Wilson for $2405 80. Acceptance being refused, Wilson brought a suit against Clements, declaring, 1. Upon the bill as accepted. 2. Upon a promise to accept such bills as should be drawn. 3. For money had and received. The Court held that the action could not be maintained; and, without deciding that an action would not lie, had the bill been seasonably drawn, yet that "the length of time alone was a sufficient reason why the defendant's promise should not be considered as conclusively binding on him." Sedgwick J. who delivered the opinion of the Court, said, "It would in my opinion be unreasonable to hold the defendant at all responsible for any bill which Hinckley might be induced, within two years to draw upon him, to obtain a release from imprisonment." Wilson v. Clements, 3 Mass. R. 1.

[(*l*) Storer, as payee, sued Logan, Lenox & Co. as acceptors of two bills, drawn by Weeks & Son. The evidence to prove the acceptance, was a letter from Lenox addressed to Weeks & Son, in which he engages that his firm shall accept certain bills to be drawn by Weeks & Son; the plaintiff received the bills on the credit of the letter, and it was admitted that they were drawn pursuant to the authority given by the letter. At the trial before Sewall J. the defendant was admitted to prove that at the time the letter was shown to the plaintiff, he was informed, "that the undertaking to accept was to be understood conditionally, and depended altogether upon certain shipments to the defendants which the drawers were then engaged in making; and that if these shipments failed, the bills would not be paid." Verdict for defendants, subject to the opinion of the Court. Sewall J. delivered the opinion of the Court. He said that the letter amounted to an acceptance of any bill drawn "pursuant to the license and credit given, and negotiated upon the faith of that engagement." "We concur in opinion that the delivery of the letter was subject to an explanation by parol testimony. The holder of the bill possesses with it a letter, which is

An agreement by a merchant to accept bills drawn by his correspondent, to the amount of goods which his correspondent may consign to him, is not binding as an acceptance of bills afterwards drawn by the correspondent in pursuance of this authority, though it seems it is a good ground of action on the promise to accept, either by the correspondent himself, or any person taking the bills on the credit of the promise to accept. (*m*)

A letter containing the following words: "I have no objections to accepting for you at three and four months for $2500, on the terms you propose," is held to be an acceptance of a

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evidence of an acceptance or a credit to the drawer, until this evidence is controlled by the circumstances communicated to the payee of the bill, the plaintiff in this action, and the manner in which he became possessed of a letter and promise not addressed to him is made to appear. Thus controlled, there is no evidence of an absolute, but only of a conditional and restricted promise to accept: which under the circumstances proved did not amount to an acceptance." Judgment on the verdict. Storer v. Logan, 9 Mass. R. 55.]

[(*m*) Boyce v. Edwards, 4 Pet. S. C. R. 111. This was an action against Boyce and Henry as acceptors of two bills of exchange. The evidence tended to show that they had, by their correspondence with Hutchinson, agreed that he might draw on them for the price of cotton, purchased by him and consigned to them, on his sending them the bill of lading; and that Hutchinson, having purchased cotton of Edwards, and sent the bills of lading to Boyce, drew on them in Edwards's favor for the price. Boyce & Henry refused to accept the bills when presented. Thompson J. in giving the opinion of the Court, said—"The distinction between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept, seems not to have been adverted to. But the evidence necessary to support the one or the other is materially different. To maintain the former, as has been already shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter the evidence may be of a more general character, and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of the promise. Courts have latterly leaned very much against extending the doctrine of implied acceptances, so as to sustain an action upon the bill. For all practical purposes, in commercial transactions in bills of exchange, such collateral acceptances are extremely inconvenient, and injurious to the credit of the bills, and this has led judges frequently to express their dissatisfaction that the rule had been carried as far as it has, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. As it respects the rights and remedy of the immediate parties to the promise to accept, and all others who may take bills upon the credit of such promise; they are equally secure and equally attainable by an action for a breach of the promise to accept, as they would be by an action on the bill itself."]

bill for $2500, drawn by the person to whom the letter is addressed, payable at four months after date and negotiated on the credit of the letter. (*n*)

A receipt for money which promises to hold the money subject to the order of the party paying it, has been held to be an acceptance of a bill afterwards drawn, which was taken on the credit of the receipt. (*o*)]

A promise to the drawer, that a bill then drawn (35) "shall meet with due honor;" or that the writer will (36) "accept

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[(*n*) Parker v. Greele, 2 Wend. 545. Greele wrote to Stone, acknowledging the receipt of some paper, and continued, "I have no objections to accepting for you at three and four months for $2500, on the terms you propose." Stone drew a bill on Greele payable at four months after date, which Parker endorsed on being shown Greele's letter. The bill was discounted at a bank on the faith of the letter; but being afterwards presented to Greele, he refused to accept it.—Parker having paid the amount of the bill at the bank, sued Greele as acceptor, and it was held that he was liable. Southerland J. in giving the opinion of the Court, after having stated the general doctrine as to acceptances of non-existing bills, says, "It may fairly be inferred that the draft was in anticipation of the proceeds of the paper which the defendant acknowledges the receipt of, and that the terms alluded to refer to the manner in which Stone had proposed to provide for the bill. The defendant was satisfied with those terms, and absolutely promised to accept the bill. The terms alluded to were no part of the bill; nor can they be considered as a qualification, limitation, or condition of the acceptance."—"A promise to accept for $2500 at three and four months, authorized a draft for the whole sum at four months, the longest period named. The option given to draw for a part at three months must be presumed to have been intended for the benefit of the drawer, and if he thought proper to waive that advantage, and embrace the whole amount in one bill at the longest period named, it would seem to be no violation of the spirit of the authority conferred by the drawee."

This decision was affirmed in the Court of Errors, the Chancellor, (Walworth) and seven senators dissenting. Greele v. Parker, 5 Wend. 414.]

[(*o*) Where creditors, receiving money from their debtor's clerk, which was not intended as a payment of the debt, gave a receipt for the amount, which said—"which we promise to hold subject to the order of" the debtor, it was ruled in Baltimore County Court, by Nicholson C. J., that this receipt amounted to an acceptance of a bill afterwards drawn, which was taken on the faith of this receipt. M'Kim v. Smith, 1 Hall's Law Journal, 486.]

(35) See Clarke v. Cock, ante p. 164, n. (29), and Pierson v. Dunlop, ante p. 155. n. (4).

(36) Wynne v. Raikes, 5 East's Rep. 514. On 9th Nov. 1801, Brown in America, drew on the defendants in London, a bill for 500*l.* at sixty days after sight; and on the same day wrote to them, that he had val-

or certainly pay" it, is, where 1 & 2 Geo. IV. c. 78, does not apply, an acceptance.

And this, although the letter containing the promise was not received until (37) after the bill had become due; and although no person has been (37) induced by such promise, to take the bill.

A promise by the drawee of a bill to a person identified with the drawer (38), that the drawee will accept it, is, where 1 & 2 Geo. IV. does not apply, an acceptance. (38)

And, protesting a bill for non-acceptance after a prior parol acceptance, will not preclude the person protesting from insisting on such acceptance, if he were ignorant, when he had the protest made, that there had been such acceptance. (38)

But, to make a promise, in a letter to the drawer, where the bill is payable to a third person, amount to an acceptance, it ought to be in terms which do not admit of doubt. (39)

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ued on them for 5548*l.* by divers bills, of which he requested their acceptance. The bill for 500*l.* which was one of those bills, was endorsed by the payees to the plaintiffs in London, for a valuable consideration. On 2d Jan. 1802, the plaintiffs, on receiving the bill, presented it for acceptance, which was refused. On 13th January, 1802, the defendants wrote to Brown, stating, that as their prospects of security had improved, they would "accept or certainly pay all the bills which had then appeared." The bill for 500*l.* had so appeared. This letter was received by Brown in America on 19th March, 1802. The plaintiffs presented the bill for payment on 6th March, sixty-three days after the presentment for acceptance, and on payment being refused, brought this action on the bill. At the time when the bill was drawn, Brown was indebted to the defendants, and still continued to be so, to the amount of 5000*l.* A verdict was found for the plaintiffs, subject to the opinion of the Court of King's Bench. The Court held that the case of Powell v. Monnier was in point; that this was a good acceptance. Postea to the plaintiffs.

(37) See Wynne v. Raikes, preceding note.

(38) Fairlee v. Herring, ante p. 165.

(39) Rees v. Warwick, 2 B. & A. 113. 2 Stark. 411. Action against defendant as acceptor of a bill drawn by Dennison and Co., to the order of Johnson and Co., dated 3d May: 4th May, Denison and Co. wrote to defendant, "We yesterday valued on you, favor Johnson and Co. for 100*l.*, which please to honor:" defendant answered, "Your bill 100*l.* &c. shall have attention." This letter was shown by Denison and Co. to Johnson and Co., and by them, before he took the bill, to plaintiff; it was insisted this amounted to an acceptance. Bailey J. thought not; but it being suggested that in the dealings between these parties, these words had that meaning, other letters from defendants were read in evidence, but they did not prove the point: the jury inti-

An answer in reply to a letter of advice from the drawer desiring it may be honored, that the bill "shall have attention," will not, in general, amount to an acceptance. (39)

And it will make no difference that this answer is communicated to an endorsee before he takes the bill. (39)

But if, by the course of dealing between the parties, these words be considered as an acceptance, they will have that effect.

So in cases not within 1 & 2 Geo. 4., a verbal promise to accept, though the party expressly defer a written acceptance, as where he says, "Leave the bill and I will accept it," is a (40) complete acceptance. And a verbal promise to accept a returned bill when it shall come back, is binding (41) if it do come back.

Saying, "Send the bill to my counting-house, and I will give directions for its being accepted," is not of itself an acceptance; the bill must be sent to the counting-house. (42)

An answer by the drawee when a bill is called for "There is your bill; it is all right," is no (43) acceptance.

[And the drawee's saying to a person not a party, or acting for a party to the bill, that "he must pay it," or "would have to pay it," is not an acceptance. (*p*)]

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mated their opinion that these words, per se, did not amount to an acceptance; and nonsuit, with liberty to plaintiff to move to enter a verdict; motion accordingly; but the Court were also of opinion that these words by no means imported an unequivocal acceptance of the bill, and as the jury were of that opinion in this case the nonsuit was right.

(40) D. Molloy, B. 2. c. 10. s. 20. Mar. 2d. ed. 17.

(42) Cox v. Coleman, ante, p. 156, note (7).

(42) Anderson v. Hick, 3 Campb. 179. Acceptance being refused by the drawees, the holder remonstrated with the managing partner, who said, "If you will send it to the counting-house again, I will give directions for its being accepted." In an action against the drawees as acceptors, it was urged that without proof of the bill's being again sent to the counting-house, this answer was an acceptance. And per Lord Ellenborough, "it was only a conditional promise to accept, and could not operate as an acceptance till the bill was sent back."

(43) Powell v. Jones, Espinasse, 17. In an action against the defendant as acceptor of a bill, the only evidence to prove the acceptance was, that when the bill was called for, he returned it, and said, "There is your bill; it is all right." Lord Kenyon thought these words could by no implication amount to an acceptance, and nonsuited the plaintiff. Vide ante, p. 164, note (27).

[(*p*) Martin v. Bacon, 2 S. Car. R. 132.]

Saying, when a bill is presented for payment, "that it will be paid," if said with reference to immediate payment, will not amount to an acceptance, if the person who brought the bill, decline the immediate payment (44) because he makes an ulterior demand.

Especially if the drawee has before refused to accept. (44)

[If the drawee of a bill payable at sight expresses a willingness to pay it at a future day, and the holder replies he shall return it to the drawer, though in fact he does not, this is not an acceptance, but a mere offer to accept, which is not acceded to, and gives the holder no ground of action against the drawee. (*q*)

Where the drawee, who had refused to accept some bills, said he would have accepted them if he had had funds; and, after receiving funds, said he would have paid the bills but for some expressions of the endorsee which he thought reflected on his honor; adding, that he told the clerk of the endorsee that when he got the funds he would pay the bills; this was held to be an acceptance. (*r*)

A supercargo or other agent cannot by drawing a bill on his principal bind the latter as acceptor, unless the agent have special authority for the purpose. (*s*)

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(44) Anderson v. Heath, Trin. 1815, 4 M. & S. 303. A bill for 2000*l.* at sixty days' sight, was presented to defendants, the drawees, 2d August, 1814, for acceptance, which they refused, and it was protested. At the end of the sixty days, 4th October, it was brought for payment, and one of defendants said, "This bill will be paid; but we cannot allow you for a duplicate protest," which was charged, and he was about to pay the bill; but the clerk who brought it said, "he could not receive the payment without all the charges, without further orders;" and he went away for instructions: he returned in half an hour; but in the interim defendants had learnt that the drawer had failed, and they refused payment. An action was brought on the ground that the saying, "the bill would be paid," was an acceptance; but, on case, the Court held it was not; it was said alio intuitu; acceptance did not enter into the contemplation of either party at the time; they thought of immediate, not future, payment; defendants did not think of giving a pledge, nor the clerk of receiving one. Nonsuit.

[(*q*) Peck v. Cochran, 7 Pick. 34. In this case evidence to show that the drawee had funds at the time of the presentment, was held to be irrelevant and inadmissible, the action being against him as acceptor.]

[(*r*) Mandizabal v. Machado, 3 Moore & Scott, 841; S. C. 6 Car. & P. 218.]

[(*s*) See Scott v. M'Lellan, 2 Greenl. 199.

The right of a merchant to protest bills of a correspondent who has overdrawn, is not taken away by his having paid other bills drawn by the correspondent, and thereby given them currency. (*t*)

Where goods are consigned to a factor on the condition that he shall accept a bill drawn on the credit of the consignment, and he refuses to accept the bill, but obtains possession of the goods, it has been questioned whether receiving the goods did not render him chargeable as acceptor of the bill. (*u*)

But where goods are consigned to a factor on the condition that he shall accept a certain bill, he has no right to receive the goods without accepting the bill; and if he gets possession of the goods without any other authority from the consignor, he cannot hold them as consignee. (*u*)]

In cases to which 1 & 2 Geo. 4. does not apply, the drawee's keeping a bill presented for acceptance (45), may account to an acceptance;

A commission merchant was in the habit of purchasing goods in his own name, for a merchant in a different State, and then drawing on his principal to pay for them, as he was authorized to do; but a large balance being due from him to his principal, the latter wrote him directions to purchase certain goods, saying "Apply all the funds you have which you say will be convenient to you to invest" to the purchase, adding "as you have given me assurances that you will apply all my funds in your hands at that period, I cannot have any doubt on the subject." The agent purchased the goods in his own name, showing at the time his principal's letter to the vendor; and then drew bills on his principal in favor of the vendor for the amount of the purchase. The principal refused acceptance. In an action by the vendor against the principal, it was held that he was not bound to accept the bills, and also that he was not liable for the price of the goods. Parsons v. Armor, 3 Pet. 413.]

[(*t*) Parsons v. Armor, 3 Pet. 413.]

[(*u*) Allen v. Williams, 12 Pick. 297.]

(45) Harvey v. Martin, King's Bench, sittings after Michaelmas Term, 1806. In an action by the payee and holder of a bill against the defendant as acceptor, it appeared that the bill was drawn in Guernsey, where the drawer and the plaintiff resided, on the defendant, who lived in Cornwall, dated 13th March, 1805, at three months; within a fortnight after it was drawn, the plaintiff sent it to the defendant, desiring him to accept it, and remit it to S. Dobree, the plaintiff's correspondent in London. On the 13th April, 1805, the plaintiff, finding that the bill had not been sent to S. Dobree, wrote to the defendant requesting him to accept and send it, stating, that though he considered the keeping the bill as tantamount to an acceptance, yet that it was not the same to him, as S. Dobree would not give him credit for it until he

And so may his destroying it.

But if there be a refusal to accept, and the holder submit to that refusal, but omit taking the bill away, a subsequent destruction by the drawee is not necessarily an acceptance. (46)

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received it accepted. The defendant, however, did not accept the bill, nor remit it, nor give any notice of his refusal so to do. On the 1st of June the defendant signed a letter, admitting that he had kept the bill, though told by the plaintiff that he considered his doing so as tantamount to an acceptance, "as he intended to have paid it," but having no effects of the drawer's, he refused to pay: and on 4th July, when the bill was protested for non-payment, he said he had neglected to write an acceptance upon it, thinking it of no consequence, "as he meant to pay it." Lord Ellenborough referred to a MS. case of Trimmer v. Oddie, mentioned post, p. 185, in which Lord Kenyon expressed an opinion, that a mere keeping of a bill was an acceptance; and said he inclined to entertain the same opinion; but should leave that question to the jury on the custom. Gibbs, however, for the defendant, admitting that he could not answer the case, a verdict was found for the plaintiff. And on an application to Lord Ellenborough to certify for a special jury, his Lordship refused, saying that this was a clear case; but that if it had not been attended with such strong admissions on the part of the defendant, but had been a mere case of a bill kept by the drawee, he should have thought it a fit case for a special jury to decide whether such detention of the bill amounted to an acceptance.

See Scaccia de Commerciis et Cambio, fol. 383. num. 335, who, in enumerating the different acceptances, mentions that which is made "tacite per receptionem et *detentionem* literarum." See also Pothier, Contrat de Change, part i. c. 3. s. 3. p. 39., who observes, that the ordonnance having directed that an acceptance should be in writing, had rendered inadmissible the "*acceptation tacite*" resulting from the drawee's having received and retained the bill.

(46) Jeune v. Ward, 1 B. & A. 653. 2 Stark. 326. Godfrey was entitled to a 200*l.* legacy under a will, to which defendant was an executor, and he drew upon defendant for 150*l.* at sight in favor of plaintiff, who was a creditor: the bill was drawn 28th May; on 29th, plaintiff went to defendant, who lived in the country, and left the bill for acceptance: in June plaintiff wrote to defendant's solicitor, Egerton, saying defendant had refused to accept the bill, desiring his assistance to get payment from the drawer: Egerton apprised him when the legacy was to be paid, and Godfrey having received it without paying plaintiff, plaintiff applied to defendant to return the bill, to which defendant replied, that having also been applied to by Godfrey's mother to send it her, he had, to avoid trouble, destroyed it. Plaintiff brought an action, on the ground that the destruction was tantamount to an acceptance; and of that opinion was Lord Ellenborough, and verdict for plaintiff. On rule nisi for a new trial, and cause shown, Lord Ellenborough retained his opinion; and Holroyd J. thought, that, in general, destruction was equivalent to acceptance; but as there was a refusal to accept, and plaintiff seemed to consider defendant not liable in June, he thought there ought to be a new trial, to put the facts upon the

If a bill be sent by the post to the drawee for acceptance, that having been the course between the holder and drawee, a neglect by the drawee to return it for ten or twelve days, whilst he is waiting to see whether the drawer will send him funds, is no acceptance. (47)

Though he keep it at the instance of the drawer on a promise from him of funds. (47)

At least, it is not, if by the course of dealing between the holder and the drawee, the former be apprised that the latter will accept, without delay, when he has funds, and that he will not accept without. (47)

A fortiori the holder cannot insist upon it as an acceptance, if he make no remonstrance on account of the delay whilst the bill is kept, or when it is returned unaccepted. (47)

And if the holder send the bill by post to the drawee, and thereby make him his agent, quære, whether any neglect by the drawee will have any other effect than that of subjecting the drawee to a special action for the negligence? (47)

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record: Bayley and Abbott Js. thought, under the circumstances, the destruction was no acceptance; and rule absolute. Bayley J. doubted whether, in any case, destruction would do more than subject to an action of trover.

(47) Mason and others v. Barff, M. 59 Geo. 3. 2 B. & A. 26. Brankstone used to draw on defendants for wool he sent them: August 1814, plaintiffs, who used to discount the bills, sent one by letter to defendants, and defendants returned it accepted; but said, it would be well for the future if plaintiffs would inquire whether the wools were delivered to the carrier, and the invoices and the carrier's acknowledgment sent, and in such case the bills would be accepted without delay: 25th February, plaintiffs sent another bill for acceptance, which arrived 27th; but defendants, not having received remittance of the invoice, &c. omitted returning it till 8th March, and then sent a letter to say they could not accept, because they had not received the invoice, &c., and said they had kept it during the interval on a promise from Brankstone that the invoice should be sent: this letter arrived 11th March, on which day, before its arrival, plaintiffs sent another bill for acceptance, making no mention of the other bill; defendants kept both bills till 25th March, and then sent back both unaccepted. Plaintiffs insisted that defendants' conduct amounted to an acceptance of both, and they brought an action; but, on argument, the Court was clear against plaintiffs; for, as they knew the bills would be accepted without delay if the invoices, &c. were sent, they must have concluded, from the delay, that defendants were waiting for them: that their making no remonstrance when they wrote on 11th March, implied that they so considered it, and their making no reply to the letter of the 8th

By the usage of trade, a banker in London will not render himself responsible by retaining a check drawn on him (48), provided he return it at any time before 5 o'clock in the evening of the day on which it is drawn.

An acceptance to pay when remitted for, is (49) a conditional acceptance.

So, an answer by a drawee who lived in London, that a ship was consigned to him and a person in Bristol, and that till he should know to which port the ship would come he could not accept, connected with a subsequent answer that the bill was a good one, and would be paid though the ship should be lost, was (50) held a conditional acceptance only; it being clear that the drawee looked for an opportunity of reimbursing himself, and had three events in contemplation,—the ship's arrival at Bristol, her arrival at London, and her loss: in the two lat-

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of March, showed that they did not then consider silence as an acceptance: and had they meant so to consider it, they should at once have written to say so to defendants; because, that would have prevented defendants' keeping the second bill, and would have put them upon getting funds for the first. Nonsuit.

(48) Fernandez v. Glynn, 1 Campb. N. P. C. 426. n. In this case it was decided, that, by the custom in London, a banker might return a check at any time before five o'clock of the day on which it was drawn. And although the check had been cancelled by mistake, yet having been returned within the time, the banker was holden to be discharged.

(49) Banbury v. Lisset, Str. 1211. The drawee accepted a bill "for Lissett and Galley, of Leghorn, to pay as remitted from thence at usance;" and it was objected, in an action against him, that there was no evidence to show he had a remittance, and that his acceptance was conditional only. Lee C. J. declared he so understood it; but he left it to the jury, and they found for the defendant upon another point, and gave no opinion upon this.

(50) This was the case of Sproat v. Matthews, 1 Term. Rep. 182. The ship did arrive at London, and the defendant disposed of the cargo; but it appearing that upon the defendant's answer that the bill would be paid though the ship should be lost, the plaintiff noted the bill for non-acceptance, Buller J. held that the acceptance was conditional only, and that the noting showed the plaintiff did not choose to take it, and he directed a nonsuit; and upon a rule to show cause why there should not be a new trial, the Court, viz. Willes, Ashhurst, and Buller, Js. concurred that the acceptance was conditional only; but Willes J. thought if there were a doubt whether it was conditional, or whether the plaintiff had precluded himself from insisting upon it, all the facts should have been left to the jury, and he was therefore of opinion that the nonsuit should be set aside; but the other Judges thought differently, and the rule was discharged.

ter he should have the opportunity, and therefore accepted; in the former he should not, and did not accept.

But, an answer by the drawee, that he would pay if I. S. would not, but that he must first apply to him, not that he thought he would pay, but because he judged it right to put him to the trial, with an assurance to the holder that he might rest satisfied of the payment, was, before 1 & 2 Geo. 4., held (51) an absolute acceptance.

If a man purpose making a conditional acceptance only, and commit that acceptance to writing, he should be careful to express the conditions therein; for it may at least be doubted whether parol evidence of such conditions would be admissible; if it were, the onus of proving them would be upon the acceptor, and the proof would be of no avail if the holder, or any person under whom he claims, took the bill without notice of such conditions, and gave a valuable consideration for it.

A conditional acceptance becomes absolute, as soon as its conditions are performed.

Thus, an answer by the drawee, that he could not accept until a navy bill should be paid, was thought (52) to operate as an absolute acceptance upon the payment of the navy bill.

So, an answer that the bill would not be accepted till certain goods against which it was drawn arrived, was held vir-

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(51) Wilkinson v. Lutwidge, Str. 648. Two bills drawn on the defendant were sent to him by the plaintiff's agent for acceptance, and he wrote for answer, "The two bills which you sent me I will pay, if the owners of the Queen Anne do not: and they living in Dublin must first apply to them: I hope to have their answer in a week or ten days. I do not expect they will pay them, but I judge it proper to take their answer before I do, which I request you will acquaint Mr. Wilkinson with, and that he may rest satisfied of the payment." He afterwards wrote, "I have not had an opportunity of sending the bills to the owners of the Queen Anne, but will take the first opportunity, and shall then remit to the gentlemen concerned, according to my promise." One of the bills he paid, but being sued upon the other, he contended that his acceptance was conditional only, to pay if the owners of the Queen Anne did not; but Raymond C. J. held it an absolute acceptance, and that the attempt to procure payment from the owners of the Queen Anne was to be made by him, and was wholly for his benefit and accommodation, but that the plaintiff was to have his money at all events. The jury found accordingly for the plaintiff.

(52) Pierson v. Dunlop, ante, p. 155.

tually an acceptance when they did arrive and were received. (53)

But if the drawee say he cannot accept without further directions from I. S., and I. S. afterwards desire him to accept, and draw upon A. B. for the amount, the (54) mere drawing upon A. B. will not make this an acceptance, although the actual payment of the bill upon him may.

[In case of a conditional acceptance, the holder, in order to recover in an action against the acceptor, must show performance of the condition. (*v*)

If the holder of a bill, who is entitled to an absolute acceptance, takes a conditional one, he cannot resort to the drawer, except upon the drawee's failure to pay according to the terms of such conditional acceptance. (*w*)

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(53) Miln v. Prest, Holt, 181. 4 Campb. 393. Endorsee against defendant as acceptor, and question whether what defendant had written or said amounted to an acceptance. The drawer bought wheat for defendant, and in a letter to him defendant said he would accept bills for it when they received notice that the wheat was shipped; this letter had been shown to plaintiff (before he took the bill): when the bill was presented for acceptance, defendant said he would not accept till the wheat arrived; the wheat afterwards arrived, and defendant accepted it, and sold it. Gibbs C. J. was clear that the letter would have been no acceptance, had it not have been shown to plaintiff; but he said a conditional acceptance was valid if the conditions were performed: this wheat arrived, and defendant had it and sold it; and he was clear what defendant had done was equivalent to an acceptance; and verdict for plaintiff.

(54) Smith and another v. Nissen and another, 1 Term Rep. 269. Taubert ordered goods of the defendants, and desired them to draw on the plaintiffs for the amount, which they did: the plaintiffs wrote two letters to the defendants, one saying they could not accept, because the defendants had sent more goods than were ordered, but that they had written to Taubert for further directions; the other, saying they had written to Taubert, and were waiting his answer before they could accept, but had desired the holder to keep the bill; in the mean time, Taubert desired the plaintiffs to accept, and draw on Goverts for the amount: they accordingly drew on Goverts, who refused to accept, and upon that they paid the bill for the honor of the defendants, and brought an action against them for money paid; the plaintiffs had a verdict; but the defendants moved for a new trial, on the ground that the drawing on Goverts was an acceptance of the bill drawn by the defendants. Sed per cur. "What the plaintiffs did, did not amount to an acceptance; they never meant to make themselves liable, unless the bill they drew was accepted and paid," and a rule was refused.

[(*v*) Read v. Wilkinson, 2 Wash. C. C. R. 514.]

[(*w*) Campbell v. Pettengill, 7 Greenl. 126.

The drawee of a bill refused to accept it, but said that if certain goods were sold when the bill became due, he would pay it. The goods, before the bill became due, were attached in his hands by a creditor of the drawer. It was held in South Carolina that the drawee was not bound to pay the bill. (*x*)]

An acceptance varying from the tenor differs from it either in the (55) sum, the (56) time, the (57) place, or (58) mode of payment.

[A dated acceptance, which says payable on a certain day, which is in fact the last day of grace, is according to the tenor of the bill; and the drawer is not discharged by the holder's taking such an acceptance. (*y*)

If a similar acceptance be made without any date, parol evidence is admissible to show when the acceptance was in fact made. (*z*)]

The effect of accepting a bill in such way as to make it payable at a banker's, or elsewhere than at the drawee's residence or place of business, (59) has been matter of great con-

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Where a draft was drawn on the Trustees of a Company requesting them to pay a certain sum of money, which they accepted to pay when in funds of the Company, it was held that the drawers of the bill were not liable without proving a presentment after the Trustees had received funds of the Company, and notice to the drawers. Andrews v. Bagge, 1 Minor, 173.]

[(*x*) Browne v. Coit, 1 M'Cord, 408.]

(55) Vide Wegersloffe v. Keene, antè, p. 157. note (10).

(56) Vide Walker v. Atwood, antè, p. 157. note (10).

Paton v. Winter, 1 Taunt. 420. The drawee altered the time of payment of a bill from one month to two, and accepted it; the holder kept it the two months and then presented it for payment; the Court held that this was an acquiescence in the alteration; and the holder having brought an action on the case against the acceptor for having mutilated the bill, they directed a nonsuit.

(57) Bishop v. Chitty, and Smith v. De la Fontane, post.

(58) Vide Petit v. Benson, antè, p. 158. note (10).

[(*y*) Kenner & al. v. Their Creditors, 19 Martin, 540. In this case the bill, which was payable at sixty days sight, was accepted September 14, 1825, "payable on the fourteenth of November," and protested on the latter day for non-payment. It was held that the drawers were liable, as the 14th November was the last day of grace, and therefore the acceptance conformed to the tenor of the bill.]

[(*z*) Kenner & al. v. Their Creditors, 20 Martin, 36; Kenner & al. v. Their Creditors, 1 Miller, 120.]

(59) See post.

troversy and difference of opinion; but the point is now settled by 1 & 2 Geo. 4. c. 78. (60)

By that statute, if the acceptance merely make it payable at a particular house, without any further expression in such acceptance, it is to be deemed a general acceptance. (60)

If it make it payable at that house *only*, "and not elsewhere," a qualified one. (60)

Where it operates as a general acceptance, a neglect to present for payment on the day it becomes due, or within a reasonable time afterwards, will not throw the loss upon the holder and discharge the acceptor; though the house fail in the interim, with money in their hands of the acceptor to the amount of the bill: for, upon a general acceptance, no neglect to present for payment will discharge the acceptor; and an acceptor should see from time to time how his account with the house stands, and what bills are paid. (61)

And a total neglect to present it there will not exonerate the acceptor from paying the principal;

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(60) By 1 & 2 Geo. 4. c. 78, After 1st August, 1821, if any person shall accept a bill of exchange, payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but, if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment when such payment shall have been first duly demanded at such banker's house or other place.

(61) Turner v. Hayden, 1 Ryan & Moody, 215. 4 Barn. & Cr. 1. Two bills were drawn on defendant, due 21st and 31st August: defendant accepted them "payable at Marsh and Co.'s" Marsh and Co. stopped payment 13th September. Defendant had money in their hands beyond the amount of the bills, from the time the bills became due till Marsh and Co. failed. The bills were not presented at all at Marsh and Co.'s, and they were not presented to defendant till 21st September. It was insisted, that as the bills would have been paid had plaintiff presented them at Marsh and Co.'s before 13th September, plaintiff ought to bear the loss. Abbott C. J. thought otherwise, but saved the point; and on motion for nonsuit the Court agreed with him, that as this was to stand as a general acceptance, plaintiff was under no obligation to present the bill at Marsh and Co.'s; and if not, he was not guilty of what the law calls laches: he had only omitted doing what he was not bound to do.

But it will from paying the interest. (62)

Though any acceptance varying from the tenor will bind the person making it, the holder of a bill is entitled from the undertaking of the drawer and endorsers to expect an absolute acceptance by the drawee (63); (or, if there be several not connected in partnership, by (64) each), for the payment of the full (65) sum of money mentioned therein (66) according to its tenor; specifying (67) (if none be mentioned for the purpose) a place for its payment, and (68) expressing, if the bill be payable within a limited time after sight, the time of its presentment for acceptance: and he may reject any other.

If upon the offer of any other acceptance the holder do any act expressing a refusal to take it, as, if he give notice to any of the antecedent parties generally that acceptance is refused, or if he note or protest the bill for non-acceptance, the offer (69) is not binding.

But, protesting a foreign bill upon the refusal to give a written acceptance will be no waiver of a previous parol acceptance, if the holder were ignorant of that acceptance when he made the protest. (70)

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(62) Phillips v. Franklin, post.

(63) Mar. 2d ed. 22.

(64) Molloy, B. 2. c. 10. s. 18, 19. Mar. 2d ed. 16.

(65) Molloy, B. 2. c. 10. s. 20. Mar. 2d ed. 17. Beawes, s. 218. p. 443.

(66) Molloy, B. 2. c. 10. s. 28. Mar. 2d ed. 21. Beawes, s. 221. p. 444. See Boehm v. Garcias, 4 Campb. 425, where Lord Ellenborough held that the holder was not bound to take an acceptance to pay in a different kind of currency from that mentioned in the bill.

(67) Mutford v. Walcot, Lord Raym. 575. per Holt C. J.: "If a bill be payable at London, and the person on whom it is drawn accept it, but names no house where he will pay it, the party that has the bill is not bound to be satisfied with this acceptance."

(68) Beawes, p. 452. Where a bill is drawn payable at so many days' sight, the acceptance must express the day it is made.

(69) Sproat v. Matthews, antè, p. 178. note (50), and Bentinck v. Dorrien, post, p. 187. note (77).

(70) Fairlee v. Herring, 3 Bingh. 625. Plaintiffs left a bill for acceptance, and upon non-acceptance protested it. They afterwards discovered that there had previously been a parol acceptance, and they thereupon brought an action upon it against the drawees. Upon a case reserved, it was insisted that the protest for non-acceptance precluded plaintiffs from saying there had been an acceptance: but as plaintiffs were ignorant of the parol acceptance when they made the protest, the Court were clear the protest did not destroy their right to insist upon the parol acceptance: judgment for plaintiffs.

There is a case, (71) however, in which it has been supposed to have been decided, that if the holder strike out an acceptance which varies from the tenor of the bill, and substitute an acceptance according to the tenor, he may afterwards restore the acceptance he struck out, and that such acceptance will continue binding; but it has (72) been doubted whether the determination went farther than to decide, that the alteration in the acceptance (though it annulled the acceptance and discharged the acceptor) did not destroy the obligation of the bill as to the other parties.

An alteration in a material point certainly vacates an acceptance. (73)

And an alteration by substituting or adding a new place for payment is an alteration in a material point. (73)

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(71) Price v. Shute, Beawes, s. 222. 1st ed. p. 444. Moll. B. 2. c. 10. s. 28. A bill was drawn payable the 1st of January, and the drawee accepted it to pay the 1st of March: the holder struck out the 1st of March, and substituted the 1st of January, and sent the bill for payment on that day, which the acceptor refused: the holder then struck out the 1st of January and restored the 1st of March; and in an action on this bill, the question was, Whether these alterations did not destroy the bill? And Pemberton C. J. ruled that they did not.

(72) In Master v. Miller, 4 Term Rep. 330, Lord Kenyon, in commenting on the case of Price v. Shute, observes, that the books do not say against whom the action was brought; and it could not have been against the acceptor, because his acceptance was struck out by the party himself who brought the action; and he concludes, "that on the person to whom the bill was directed refusing to accept the bill as it was originally drawn, the holder resorted to the drawer;" however Buller J., 4 Term Rep. 336, says, he cannot consider this case in any other light than as an action against the acceptor, because the books only state what passed between the holder and the acceptor.

(73) Tidmarsh v. Grover, 1 M. & S. 735. Defendant accepted a bill "payable at Bloxam and Co.'s." Bloxam and Co. failed; the holder struck out their names, and without defendant's knowledge or consent inserted "Esdailes."—The point was reserved whether this alteration vacated the acceptance, and the Court held it did, and ordered a nonsuit to be entered.

Cowie v. Halsall, 4 Barnew. and Ald. 197. Endorsee against acceptor. It appeared that the acceptance was general, and that the drawer, without the acceptor's knowledge, added to the acceptance, "payable at Mr. B.'s, Chiswell-street," and on the ground that this was a material alteration, and vacated the acceptance, verdict for defendant. Motion for a new trial; but the Court thought the verdict right, for this alteration would lead to a presentment at B.'s, not at defendant's, and the bill might be treated as dishonored, and defendant be arrested

[If the acceptor of a bill, who accepts it to pay in a particular town, also add in a separate memorandum at the bottom of the bill, the name of a person doing business in that town, the memorandum is a part of the acceptance, and if intended to direct the place for payment, then, in order to charge the drawer or endorsers, a presentment must be made at the place of business of the person named in the memorandum. (*a*)

Where such a memorandum appears on a bill, it is for the jury to determine when, by whom, and for what purpose it was placed there. (*a*)

If the drawee of a bill, having all the parts lawfully in his possession, accept the first part and pass it to one of his creditors as security, and afterwards accept the second part, and pass it to a third person for value, and subsequently the first part is returned to the acceptor without payment, the holder of the second part can recover on it against the acceptor. (*b*)]

An acceptance once completed and issued (74) cannot be revoked.

And there are cases (75) in which it was held, that if the

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thereon, without any presentment where defendant would expect it; and rule refused.

[(*a*) Tuckerman v. Hartwell, 3 Greenl. 147. This was an action by the payees against the drawer of a bill, drawn on Joseph T. Wood, of Augusta. Wood accepted it. "Accepted to pay in Boston, Joseph T. Wood." At the bottom of the paper, the words "A. F. Howe & Co." were found. Howe & Co. were merchants in Boston, and the plaintiffs had had the bill presented at their counting-room, but not till the day after the bill became due. Weston J. instructed the jury, that if they were satisfied the name of A. F. Howe & Co. was placed on the bill by the acceptor, at the time of the acceptance, and was intended to designate the place in Boston at which the bill should be presented for payment, and that the plaintiffs knew it was so intended, and where the place was, they must prove a presentment at that place on the day the bill became payable, and that the presentment actually made was too late. A verdict having been found for the defendants, the whole Court, after argument, gave judgment on the verdict.]

[(*b*) Holdsworth v. Hunter, 10 B. & C. 449.]

(74) See Marius, p. 20, and the cases mentioned in the next two notes.

(75) Thornton and another v. Dick and another, 4 Esp. N. P. C. 270. A bill drawn on the defendants, payable three months after sight, was, on the 1st of October, left with them by the plaintiffs for acceptance. It was not called for until the 11th; when it appeared that the words, "Accepted the 1st of Oct. 1799. Q. Dick and Co." had been written upon the bill, and afterwards nearly obliterated by ink. The words,

drawee wrote an acceptance upon a bill, he could not afterwards cancel it, though he cancelled it whilst the bill remained in his possession, and before it had been called for by the holder. But the contrary has since (76) been decided.

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however, were still legible. At the time of drawing the bill the defendants were in advance to the drawer. The plaintiffs, as endorsees, sued the defendants as acceptors. The acceptance and subsequent cancellation were admitted; and the only question was, whether the cancellation, having been made before the re-delivery of the bill, had discharged the acceptor. Lord Ellenborough said, that if a party once accepted a bill he had done the act, and could not retract; and that there was no difference in point of legal effect, whether the bill were payable after sight or after date. Verdict for the plaintiffs.—Trimmer v. Oddie was cited: in that case, however, the declaration contained counts against the drawee for having mutilated the bill.

Trimmer v. Oddie, 1800. A bill was left for acceptance, and accepted, but the acceptance was afterwards cut off, and the bill returned in that mutilated state. Lord Kenyon was clearly of opinion, that the acceptance once made could not be revoked, and that the acceptor was still bound. This case was cited in Bentinck v. Dorrien, 6 East's Rep. 200; and the Hamburgh ordinance was referred to as having been recognised by Lord Kenyon to be the law of merchants here: and Lord Ellenborough said, "The rule is certainly laid down in the Hamburgh ordinance as stated, that an acceptance once made cannot be revoked; though, to be sure, that leaves the question open as to what is an acceptance, whether it be perfected before the delivery of the bill." And Lawrence J. in the case last mentioned, 6 East's Rep. 201, said, "When the general question shall arise, it will be worth considering how that which is not communicated to the holder, can be considered as an acceptance while it is yet in the hands of the drawee; and where he obliterates it before any communication made to the holder." From this it would appear, that Mr. J. Lawrence had taken the same view of this question as Pothier, who cites from La Serra, ch. 10, a case where the holder of a bill having left it for acceptance, the drawee, before he returned it, cancelled an acceptance which he had written and signed upon it, and it was adjudged that this acceptance was annulled; and observes, "La raison est, que le concours de volontés qui forme un contrat, est un concours de volontés que les parties se sont réc proque ment déclarées; sans cela, la volonté d'une partie ne peut acquérir de droit à l'autre partie, ni par conséquent être irrévocable. Suivant ces principes, pour que le contrat entre le propriétaire de la lettre et celui sur qui elle est tirée soit parfait, il ne suffit pas que celui-ci ait eu pendant quelque temps la volonté d'accepter la lettre, et qu'il ait écrit au bas qu'il l'acceptoit; tant qu'il n'a pas déclaré cette volonté au porteur, le contrat n'est pas parfait; il peut changer de volonté, et rayer son acceptation."—Traité du Contrat de Change, part 1. ch. iii. s. 3. pl. 44.—See also Emerigon, Traité des Assurances, ch. ii. s. 4. p. 45, who observes, that La Serra "pose en maxime, que tant que l'acceptant est maître de sa signature, c'est-à-dire, qu'il n'a pas délivré la lettre de change, il peut rayer son acceptation."

(76) Cox v. Troy, 5 Barnew. & Ald. 474. A bill on defendant and

And before this decision it was adjudged, that if, upon such a cancellation, the holder noted the bill for non-acceptance, he (77) precluded himself from insisting that the acceptance was binding.

And if an acceptance be struck out before a bill left for acceptance is called for, the drawee is not compellable to show in evidence why it was struck out, or when, or by whom. (78)

And it makes no difference though the bill be left beyond the usual time with the drawee, if the delay be imputable not to the drawee but to the holder.

The obligation also of a complete acceptance may be (79) waived.

Co. for 938*l.* 16*s.* 10*d.*, payable sixty-one days after sight, was put into their bill-box for acceptance the 24th of May, 1820; they wrote an acceptance upon it, and dated it 24th May, 1820; the bill was not called for till the 27th of May, and before that time the acceptance was erased by inking it over: when, or by whom that was done, did not appear. Plaintiffs brought an action on the ground that the writing the acceptance bound the drawee, and that he could not afterwards cancel his acceptance: but on case, the Court were clear the acceptance might be cancelled at any time before it was delivered out by the drawee, and they ordered the postea to be delivered to the defendant. Plaintiff had leave to turn the case into a special verdict.

(77) Bentinck v. Dorrien and another, 6 East, 199. Action by endorsee against defendants as acceptors of a bill, was referred; and the arbitrator, after reciting in his award that the plaintiff, on the 31st of May, left the bill with the defendants for acceptance, that they signed an acceptance thereon, but that, on the 1st of June, and *before the bill was called for*, they cancelled that acceptance, and that the plaintiff thereupon noted the bill for non-acceptance, declared himself to be of opinion, that by such noting the plaintiff had precluded himself from insisting that the defendants had bound themselves to pay the bill, and therefore awarded in favor of the defendants. A rule nisi was obtained for setting aside this award, on the ground that the acceptance was irrevocable. But, after cause shown, the Court held that whether such acceptance could or could not be revoked, the plaintiff had, at all events, by noting the bill for non-acceptance, precluded himself from contending that the acceptance was valid. Rule discharged. See Sproat v. Matthews, ante, p. 178, n. (50).

(78) See Cox v. Troy, ante, p. 186.

(79) Vide Walpole v. Pulteney, and Black v. Peele, infra, and Mason v. Hunt, post, p. 188, n. (82);—and in Dingwall v. Dunster, post, p. 191, n. (91), the whole Court held, that though nothing short of an express agreement would discharge the acceptor, an express agreement would.

Whatley v. Tricker, 1 Camp. 35. The endorsees of a bill, knowing that it had been accepted for the accommodation of the drawer, and possessing goods of the drawer's from the produce of which they ex-

This waiver may be either expressed or implied.

An (80) agreement to consider an acceptance as at an end, or a (81) message to the acceptor upon an accommodation bill, that the business was settled with the drawer, and he need give himself no further trouble, is an express waiver; the receipt (82) of the known consideration of the acceptance, an implied one.

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pected payment, said (at a meeting of the acceptors' creditors), that "they looked to the drawer, and should not come upon the acceptors:" in consequence of which the latter assigned their property for the benefit of their creditors, and paid them 15*s.* in the pound. The drawer's goods proved to be of little value, and he became insolvent, upon which the endorsees sued the acceptors. Lord Ellenborough said, "If the plaintiff's language amounted to an unconditional renunciation of all claim upon the acceptors, whereby the latter had entered into the arrangement with their creditors, the acceptors were discharged; if only to a conditional promise, not to resort to the acceptors, if satisfied elsewhere, they were not." The jury found for the plaintiffs.

(80) Walpole v. Pulteney, cited Dougl. 236. 237—248. 249. Walpole held a bill accepted by Pulteney, but agreed to consider his acceptance as at an end, and wrote in his bill-book, opposite the entry of this bill, "Mr. Pulteney's acceptance at an end." Walpole kept the bill from 1772 to 1775, without calling upon Pulteney, and then brought this action. The jury found a verdict for the plaintiff; but the Court of Exchequer thought the verdict wrong, and granted a new trial, upon which the jury found for the defendant.

(81) Black v. Peele, cit. Dougl. 236. 237—248. 249. Black arrested Peele as acceptor of a bill drawn by Dallas, but on finding that the acceptance was an accommodation one, his attorney took a security from Dallas, and sent word to Peele that he had settled with Dallas, and that Peele need give himself no further trouble; Dallas afterwards became bankrupt, upon which Black again sued Peele; but it was held, that as Black had in express words discharged Peele, the action could not be maintained.

(82) Mason v. Hunt, Dougl. 284. 297, antè, p. 155, n. (4). Rowland Hunt agreed that his partner, Thomas Hunt, should, on consignment of a cargo, and an order for its insurance, accept bills for 3,600*l.* The cargo was consigned, the order for insurance given, and Thomas Hunt effected the insurance, but he refused to accept the bills; after some negotiation, the plaintiff, being the holder, signed a memorandum, by which, after stating that the consignment had been made on account of the bills, and that the Hunts, being apprehensive that the net proceeds might not be sufficient to discharge them, had refused to accept, he accepted the bill of lading and policy, and undertook to apply the net proceeds, when in cash, as far as they would go, to the credit of the payee, in part payment of the bills: the plaintiff afterwards sued the Hunts; and insisted that Rowland Hunt's agreement was an acceptance; but after a verdict for the defendant, and time taken to consider upon a rule to show cause why there should not be a new trial, the whole Court was clear that by the memorandum the plaintiff had

But a declaration by the holder that he should look to the drawer for payment, and that he wanted no more of the acceptor than another debt, not connected with the bill, will not be sufficient to discharge the acceptor. (83)

Though, in consequence of that declaration, the acceptor pay the other debt. (83)

An express agreement will discharge the acceptor. (84)

Or an express renunciation of all claim upon him. (84)

Or neglect to get paid when the holder has the means. (84)

Nothing else short of actual payment will. (84)

Length of time alone will not. (84)

Nor will length of time and silence, though the holder took the bill from the drawer, and hold it for his, the drawer's, balance, and though he be banker to the acceptor. (84)

And it will be no laches in the holder so as to discharge the acceptor, though the acceptor has occasionally a balance in his hands, out of which the banker might have paid himself. (84)

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waived all right to insist on Rowland Hunt's agreement, for it was obvious that the whole consideration of the acceptance was the consignment, upon which there would be a commission, and the policy, and these the plaintiff had taken to himself.

(83) Parker v. Leigh, 2 Stark. 228. In an action against the acceptor on a bill for 300*l*., the defendant proved that he owed plaintiff 700*l*. on warrants of attorney, and that plaintiff had said, that as to a 300*l*. bill, he should look to the drawer for that, and that he wanted no more from defendant than what was included in the warrants of attorney, and that in consequence of this declaration defendant paid plaintiff what was included in the warrants of attorney; but Lord Ellenborough held, that as plaintiff had not expressly renounced all claim upon this acceptance, it continued binding, and the plaintiff had a verdict.

(84) Farquhar v. Southey, 1 Moody & Malkin, 14. Defendants accepted two bills for 500*l*. to accommodate Leader. Leader endorsed them to plaintiffs, his bankers, to whom Leader was indebted. Plaintiffs kept them three years after one became due, and four years after the other, when Leader became bankrupt. Plaintiffs debited Leader with interest upon them till his bankruptcy; but up to that time they did not present the bills to defendants, nor make any demand upon them. Leader had never any balance in plaintiffs' hands whilst plaintiffs held the bills. Some time after the bills were due, defendants opened an account with plaintiffs, and on two occasions they had balances to more than the amount of these bills. It was insisted that plaintiff should have paid himself out of those balances, and that he discharged defendants by not doing so. Littledale J. thought otherwise; and after noticing that nothing would discharge an acceptor but

If the holder of a bill receive a part of the money from the drawer, and take a promise from him upon the back of the bill for the payment of the residue at an enlarged time, it (85) is for a jury to say whether this is not a waiver of the acceptance.

Where a bill has been accepted for the mere accommodation of the drawer, it has been held, that if the holder, knowing that circumstance, give time to the drawer, he (86) will discharge the acceptor.

But this has been doubted. (87) (88) (89)

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payment, express agreement, express renunciation, or neglect to get paid when the means were in the holder's own power, he said the only questions he could leave to the jury were, Whether plaintiffs ever entered into any agreement to discharge defendants, or expressly renounced all intention of holding them liable? The questions were left accordingly, and the jury found for plaintiffs.

(85) Ellis v. Galindo, B. R. M. 24 Geo. 3. cited Dougl. 250. note. James Galindo drew upon his brother for 30*l.* in favor of the plaintiff; when the bill became due James paid the plaintiff 3*l.* 15*s.* 4*d.*, and endorsed a promise to pay the remainder in three months. Three years elapsed, and then the plaintiff sued the drawee upon his acceptance. Lord Mansfield thought the defendant discharged, and nonsuited the plaintiff. An application was made for a new trial, when Lord Mansfield said, he thought the case did not interfere with that of Dingwall v. Dunster; but a rule to show cause was granted: after cause was shown, Lord Mansfield said, "The doubt is, whether the question should not have been left to the jury, it being a question of intention arising out of the circumstances." Willes J. thought it should have been left to the jury; and per Buller J., "I rather think the case should have gone to the jury; but I am not therefore of opinion that there ought to be a new trial: the endorsement could not have been meant as an additional security, for the drawer was equally liable before. I should have left the question to the jury, but with very strong observations; and as the demand is so small, I do not think there ought to be a new trial." Rule discharged.

(86) Laxton v. Peat, 2 Campb. N. P. C. 185. The holder of a bill, knowing that it had been accepted for the accommodation of the drawer, received part payment from the drawer, and gave him time for payment of the remainder: he afterwards sued the acceptor; but Lord Ellenborough held, that the acceptor was a mere surety, and by time having been given to the principal, was discharged. Nonsuit.

(87) Raggett v. Axmore, 4 Taunt. 730. In an action against the acceptor of a bill, motion for a new trial, on the ground that it was an accommodation acceptance, and that the holder had given time to the drawer. Sed per Mansfield C. J., "There was no sufficient evidence that it was an accommodation acceptance; nevertheless, excepting in the case in Campbell, it never was known that any thing passing between other parties could discharge an acceptor; but it is unnecessary to decide that question."

Especially if the holder, when he took the bill, did not know it was an accommodation acceptance. (88)

Or if it were duly presented, when due, to the acceptor, and he promised payment. (89)

Telling an accommodation acceptor that he shall not be troubled about the bill, will not discharge him, though the party knew him to be an accommodation acceptor only, if such party held for value. (90)

A neglect to call upon an acceptor, or upon any of the other parties, though for ever so long a time, shall (91) not be considered as a waiver.

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(88) Fentum v. Pocock, 5 Taunt. 192. Endorsee against acceptor, on bill drawn by Beazley. Defence, that plaintiff had taken a cognovit from Beazley, payable at a future day, without defendant's privity or consent; that defendant's was a mere accommodation acceptance, and that plaintiff knew it was so when he took the cognovit from Beazley: Mansfield C. J. thought this no answer to the action; and verdict for plaintiff. On rule nisi for nonsuit, and cause shown, two cases were cited in which Lord Ellenborough, under similar circumstances, held the acceptor discharged; but the Court thought those cases wrong, and rule discharged. Mansfield C. J. noticed that plaintiff did not know, when he took the bill, that it was an accommodation acceptance, but he disclaimed proceeding on that ground.

(89) Kerrison v. Cooke, 3 Campb. 362. Endorsee against acceptor. Defence, that it was an accommodation acceptance to accommodate the drawer, that plaintiff knew it, and that on the bill's becoming due, plaintiff gave time to the drawer without the concurrence of defendant; and Laxton v. Peat was cited as in point: when the bill was due it was presented to defendant, and he promised payment; per Gibbs J., "Grave doubts have been entertained of Laxton v. Peat, and this case may be distinguished from it: here payment is demanded of defendant, and he promises payment. I think the giving time under these circumstances to the drawer did not discharge the acceptor." Verdict for plaintiff.

Sed vide Adams v. Gregg—the next case.

(90) Adams v. Gregg, 2 Stark. 531. Defendant accepted a bill to accommodate Holmes, and plaintiff knew it; Holmes paid it to plaintiff for an old debt: when it became due defendant could not pay it, and one Jones gave plaintiff the amount, on a stipulation that he should, if necessary, stand in plaintiff's situation. Defendant asked Jones to give up the bill, which he refused, but he said defendant should not be troubled about it. Jones afterwards sued defendant in plaintiff's name; defendant insisted she was discharged. Abbott C. J. seemed to think she would have been, had Jones given time to the drawer, or disabled himself for a moment from suing him; but he thought Jones's declaration, that defendant should not be troubled, no discharge, and plaintiff had a verdict.

(91) Dingwall v. Dunster, Dougl. 235. 247. Dunster lent Wheate

If the holder of a bill agree not to sue the acceptor, upon his making an affidavit that the acceptance is a forgery, he will be (92) precluded from suing him, if such affidavit be made and sworn, though it be false.

[If a bill be endorsed by one person, and accepted by another for the accommodation of the drawer, the endorser, if he take up the bill, has the same resort against the acceptor as any other endorser. He is not to be considered as a surety for the drawer to the acceptor. (*c*)

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his acceptance, which became due 13th December, 1774; it was then in the hands of Dingwall, but he, finding that Wheate was the real debtor, wrote to his attorney in February and November, 1775, for payment, received interest upon the bill from Wheate, and suffered several years to elapse without calling on Dunster; on 13th of Feb. 1775, Dunster wrote to thank Dingwall for not proceeding against him, and said, he had been informed by a person Dingwall had sent that Wheate had taken up the bill; but Dingwall took no notice of this letter: he afterwards sued Dunster, for whom the jury found; but, upon a rule to show cause why there should not be a new trial, the whole Court held there was nothing in the plaintiff's conduct to discharge Dunster; that it meant nothing more than an indulgence to him, and that he would try to recover from the drawer if he could. Lord Mansfield said, "No use had been made of the defendant's letter; probably the fact did not warrant him in asserting that a person the plaintiff sent had told him Wheate had taken up the bill: had the plaintiff, by any thing in his conduct, confirmed him in such a belief, it might have altered the case."

Anderson v. Cleveland, 13 East's Rep. 430. n. In an action by an endorsee against the acceptor of a bill, no demand was proved till three months after the bill was due, and when the drawer had become insolvent. But, by Lord Mansfield, "the acceptor of a bill, or maker of a note, always remains liable. The acceptance is proof of having assets in his hands, and he ought never to part with them, unless he be sure that the bill is paid by the drawer."

(92) Stevens v. Thacker, Peake, N. P. C. 187. The plaintiff, who was endorsee of a bill, presented it to the defendant, as acceptor, for payment. The defendant said the acceptance was a forgery, and offered to make an affidavit that he had never accepted the bill. The plaintiff at first agreed not to sue him, if he would make such affidavit; but, being afterwards convinced that the defendant had accepted the bill, refused to receive the affidavit, and brought this action. The affidavit had been engrossed, but not sworn. It was urged, that the plaintiff could not recede from his agreement. But Lord Kenyon said, that had the affidavit been sworn, he should have held that the defendant had discharged himself from this action, though such affidavit had been false. But not having been sworn, the defendant was still liable, unless he could prove the acceptance a forgery. Verdict for the plaintiff.

[(*c*) Weir v. Cox, 19 Martin, 368.]

Sect. 2. *Notice, Want of—when excused—by want of Effects in the Drawee's Hands, or other Cause.*
——to Acceptor.
——to Maker of Note.

The receipt of a bill or note implies an undertaking from the receiver, to (1) every party to the bill or note who would be entitled to bring an action on paying it, to (2) present in proper time, the one, where necessary, for acceptance, and each for payment; to (3) allow no extra time for payment; and to give (4) notice without delay to such person of a failure in the attempt to procure a proper acceptance or payment; and a (5) default in any of these respects will discharge such person from all responsibility on account of a non-acceptance or non-payment, and will, unless (6) the bill or note were on an improper stamp, make it (7) operate as a satisfaction of any debt or demand for which it was given.

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(1) Vide post.
(2) Vide post.
[A demand of payment of the maker of a note has no effect to charge the endorser, if the person making the demand does not have the note with him at the time. Eastman v. Potter, 4 Verm. R. 313.
In Tennessee, an order for the payment of money is not considered as a bill; and a person receiving such an order from the drawer, does not lose his claim against him for the debt on account of which it is given, by a neglect of presentment and notice, unless the drawer can prove that he has been injured by such neglect. Harwell v. M'Cullock, 2 Overt. 275.]
(3) Vide Tindal v. Brown, post, note 82.
(4) Vide post, Sect. 2.
(5) Vide post, Sect. 2.
Syderbottom v. Smith, Str. 649. In an action against the endorser of a note, Eyre C. J. of the Common Pleas, directed the jury to find for the defendant, because the plaintiff had not proved diligence to get the money from the maker; being of *the old* opinion that the endorser only warrants upon default of the maker.
Gee v. Brown, Str. 792. The holder of an inland bill gave the acceptor time, by intervals, from 14th May, when the bill became due, to 7th of June, and then sued the drawer; but there being no notice to him, Eyre C. J. held the loss ought to fall on the plaintiff.
[So a letter put into the post-office, addressed to the drawee of a bill or maker of a note, requesting payment, is no presentment. Whittier v. Graffam, 3 Greenl. 82.]
(6) See Wilson v. Visar, ante p. 87.
(7) By 3 & 4 Ann. c. 9. § 7. It is enacted, that if any person doth accept any such bill of exchange, for and in satisfaction of any former

CHAP. VII.

Sect. 1. *Presentment, obligation to make.*
——— *where.*
——— *within what Hours.*
——— *for Acceptance.*
——— *for Payment.*
——— *by whom.*
——— *to whom.*
——— *of Bills, &c. payable on Demand.*
——— *of Bills, &c. entitled to Grace, &c.*
——— *Mode of computing the Time.*
——— *where the Time is computed by the Old Style.*
——— *or by the Usance.*
——— *if excused by Bankruptcy, or other Incapacity of Drawee or Maker.*
——— *right to insist on—how waived or modified.*
2. *Notice of Non-acceptance.*
——— *of partial or conditional Acceptance.*
——— *from whom.*
——— *Form of.*
——— *Protest.*
——— *at what Time.*
——— *at what Time to be given.*
——— *in what Manner—verbal.*
——— *written.*
——— *by Letter: Direction.*
——— *to whom—Bankrupt.*
——— *one of several Partners.*
——— *Drawer of Bill.*
——— *Payee or Endorser.*
——— *Persons not Parties to the Bill or Note.*
——— *Representatives of any of such Parties.*
——— *want of—when excused—by part Payment or Promise.*

Sect. 2. *Notice, Want of—when excused—by want of Effects in the Drawee's Hands, or other Cause.*
———*to Acceptor.*
———*to Maker of Note.*

The receipt of a bill or note implies an undertaking from the receiver, to (1) every party to the bill or note who would be entitled to bring an action on paying it, to (2) present in proper time, the one, where necessary, for acceptance, and each for payment; to (3) allow no extra time for payment; and to give (4) notice without delay to such person of a failure in the attempt to procure a proper acceptance or payment; and a (5) default in any of these respects will discharge such person from all responsibility on account of a non-acceptance or non-payment, and will, unless (6) the bill or note were on an improper stamp, make it (7) operate as a satisfaction of any debt or demand for which it was given.

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[The obligation of the holder of a bill or note to present it, and give notice of its dishonor and the consequences of neglect, are the same, whether the parties be merchants or not. (*a*)

The endorser of a note payable to bearer is not liable, unless a due presentment has been made to the maker. (*b*)

Where a bill or note is endorsed after it is due, though the strict rules as to demand and notice do not apply, yet in order to charge the person then endorsing it, a subsequent demand must be made on the drawee or maker, within a reasonable time, and notice of the dishonor given without delay to the endorser. (*c*)

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debt, or sum of money formerly due unto him, the same shall be accounted and esteemed a full and complete payment of such debt, if such person accepting of any such bill for his debt doth not take his due course to obtain payment thereof, by endeavoring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-payment thereof.

[See Penn v. Poumeirat, 14 Martin, 541.]

[(*a*) Penn v. Poumeirat, 14 Martin, 541.]

[(*b*) Galpin v. Hard, 3 M'Cord, 394.]

[(*c*) Ecfert v. Des Coudres, 1 S. Car. R. 69; Rugely v. Davidson, 2 S. Car. R. 33; Dwight v. Emerson, 2 N. Hamp. R. 159; M'Kinney v. Crawford, 8 Serg. & Rawl. 351; Berry v. Robinson, 9 Johns. R. 121; Hill v. Martin, 12 Martin, 177; Poole v. Tolleson, 1 M'Cord, 199; Stockman v. Riley, 2 M'Cord, 398; Houston v. Frazier, Harper's R. 10; Course v. Shackleford, 2 Nott & M'Cord, 283. M'Ilhenny v. Jones, 6 Har. & John. 256, is contra.

Swift C. J. said, "The endorsement of a bill or note after due is equivalent to drawing a new bill payable at sight; and demand must be made by the endorsee of the drawee of the bill or maker of the note, and notice given to the endorser, as in cases of bills payable at sight." Bishop v. Dexter, 2 Conn. R. 419.

A presentment in such case a few weeks after the note was endorsed, and notice of the dishonor two or three months after to the endorser, were, in one case, held to be sufficient to charge him, the evidence showing that the parties at the time of the endorsement, did not contemplate an immediate presentment. Van Hœsen v. Van Alstyne, 3 Wend. 75.

It seems to be doubted, in the case of Nash v. Harrington, 1 Aikens, 39, whether the same strictness in giving notice is required in the case of a bill or note endorsed after due, as in the case of one endorsed before it is due.

When the same case came up again, however, the Court seemed to think the same strictness was necessary, and held that where a note was endorsed long after it was due, a presentment seven days after the endorsement was too late, the holder and maker residing in the same place. The Court said the demand should have been made in a day or two at farthest. Nash v. Harrington, 2 Aikens, 9.]

And in such a case the want of a proper presentment and notice, is not excused by the holder of the note using due diligence to collect it of the maker, even if the endorser knows that the money has not been paid by the maker. (*d*)

It has been doubted whether an action could be brought against an incorporated bank on one of its own notes, not expressed to be payable at any particular place, without making a previous presentment for payment at its banking-house. (*e*)

But the better opinion is, that no such presentment is necessary. (*e*)]

The presentment is to be made where the bill or note is payable.

[Where a bill, payable at A., is drawn upon persons domiciled at B. and no place is appointed for presentment at A., presentment can only be made at the domicile of the drawers. (*f*)]

[(*d*) M'Kinney v. Crawford, 8 Serg. & Rawl. 351.]

[(*e*) In the case of the Bank of Niagara v. M'Cracken, the defendant, being sued as maker of a note, was allowed to set off notes of the bank which he held, and which he had tendered in payment of his own note, without proving a presentment of them for payment; and Woodworth J., who delivered the opinion of the Court, said, that as the notes were not payable at any particular place, an action might have been sustained on them without a demand at the bank. 18 Johns. R. 493. But in a subsequent case, the Court appear to consider the question as to the necessity of a presentment of a bank note, in order to charge the bank, as still open; and they consider that M'Cracken's having tendered the notes of the bank in payment of his own note, was equivalent to a demand of payment. Jefferson County Bank v. Chapman, 19 Johns. R. 322.

A still later case, however, Haxtun v. Bishop, 3 Wend. 13, appears to confirm the opinion given in Bank of Niagara v. M'Cracken, Savage C. J. expressing a decided opinion that no demand on a note payable on demand at the bank, was necessary previously to bringing a suit; but that if the bank be solvent, "a defence will be made out which will subject the plaintiff to costs," if the defendant pleads his having money ready to pay at the place of payment where the suit was brought, and brings the money into Court.

In New Jersey it is held, that no presentment is necessary, before bringing a suit against a bank. State Bank v. Van Horn, 1 South. R. 382.]

[(*f*) Where a bill drawn in America on persons at Liverpool, and payable in London generally, was accepted by persons in London for honor of the drawers, suprà protest for non-acceptance in the following form: "Accepted suprà protest for honor of L. & Co., and will be paid on their account if regularly protested and refused when due,"

Even where he is absent at sea, and has no place of business, if he have left a family at home, a presentment must be made at their place of residence, in order to charge the endorsers. (*l*)

So where a bill is directed to the drawee at a certain house, and by him accepted, going to that house with the bill on the day of payment and finding it closed, is a sufficient presentment. (*m*)

But a demand of payment at a place where the maker of a note once boarded, he residing at another place at the time of the demand, is altogether nugatory. (*n*)

So a demand at a store formerly occupied by the maker of a note, but not occupied by him at the time of the demand, is not sufficient to charge an endorser. (*o*)

The holder of a note's making diligent, though unsuccessful inquiry to ascertain the maker's residence, at the time the note falls due, is as effectual as an actual presentment. (*p*)]

If on a presentment it appear that the drawee or maker is dead, the holder (11) should inquire after his personal representative, and present the bill or note to him.

[(*l*) Whittier v. Graffam, 3 Greenleaf, 82.]

[(*m*) Hine v. Allely, 1 Nev. & Man. 433. Action against the drawers of a bill. The bill was drawn on Peter Perry, No. 6, Budge Row, and by him accepted. The declaration averred that the bill was presented and shown to Perry for payment, and that he would not pay it. The evidence proved that when the bill became due the plaintiff went to No. 6, Budge Row, to present it, but that the house was shut up, and Perry had apparently left his residence, and could not be heard of in the neighborhood. It was objected that the evidence did not support the averment in the declaration, that the bill had been presented and shown to Perry for payment. A verdict having been returned for the plaintiff, and motion for a rule, &c. Parke J. said "The bill was dishonored as soon as the endorsee went to the house at which it was made payable, and found it closed." And the Court refused the rule.]

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(11) Molloy, B. 2. c. 10. s. 34. "If a bill be accepted, and the party dies, yet there must be a demand made of his executors or administrators; and in default of payment, a protest must be made."

[In Louisiana where the maker of a note died on the last day of grace, and the notary, on calling at his house with the note, was informed of his death, it was held that the presentment was not sufficient, but that a demand ought to have been made on the heir or legal representative, if to be found. Toby v. Maurian, 7 La. R. 493.]

If, in the absence of a drawee, a bill has been accepted by his agent, and at the time when the bill becomes due the drawee be still absent, presentment for payment (12) should be made to such agent.

If a bill or note be made payable at a banker's, it is (13) sufficient to present it for payment at the banker's; and, if the banker be himself the holder, it is (13) sufficient for him to see whether he has effects in hand.

[So if a bill or note be payable at a bank, if the bill or note be at the bank on the day of payment, and any person there authorized to receive payment and give up the note, it is sufficient to charge the endorser. (*q*)

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[(*q*) In a suit by the Berkshire Bank against the endorser of a note payable at the Berkshire Bank, Sedgwick J. at the trial nonsuited the plaintiffs because there was no proof of a demand on the maker. Parsons C. J. delivered the opinion of the Court. "As the plaintiffs held this note, we must presume it was in their bank; and there it was made payable. The nonsuit ought to be set aside; and if on the trial the plaintiffs can show that on the day of payment the note was at the bank, and that the servants or officers of the plaintiffs were there during the usual bank hours, to receive payment and give up the note, they will be entitled to recover, as, by the terms of the note, they were not holden to demand payment but at the bank, which was impracticable, through the default of the maker." Berkshire Bank v. Jones, 6 Mass. R. 524.

See also Woodbridge v. Brigham, infrà; Bank of America v. Woodworth, post; United States Bank v. Smith, 11 Wheat. 171; Rahm v. Philadelphia Bank, 1 Raw. 335; Ogden v. Dobbin, 2 Hall's R. 102; Nichols v. Goldsmith, 7 Wend. 160.]

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non-payment; the burden of proving a payment is on the defendant. (*r*)

It is not necessary in such case for the holder to prove negatively that the maker had no funds in the bank. If he had funds in the bank at the time, it is matter of defence, and must be proved by the endorser. (*s*)

And the endorser is discharged if the note is not at the bank on the day of payment, although a personal demand is made on the maker. (*t*)]

If a bill or note be made payable at a particular house, that house is the proper place at which to make the presentment, whether such house be mentioned in the body of the bill or note, or in a marginal note, or in the acceptance only. (14)

[(*r*) Fullerton v. Bank of the United States, 1 Pet. Sup. C. R. 604; Bank of the United States v. Carneal, 2 Pet. Sup. C. R. 543.]

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[(*t*) In an action against the endorsers of a note payable at the Hartford Bank, it appeared that the note was not at the Hartford Bank, or in the possession of any officers of the Bank, or presented there by any person, on the day it became payable, or payment seasonably demanded of the maker personally. The Court held that the action could not be maintained. Parker C. J. delivered the opinion of the Court. "The general rule is, that a demand must be made on the maker of the note, *on the day it falls due.* The exception is, that when the note is payable at a particular place, such demand need not be made, if the holder or any one for him is *at the place*, with the note, so that he may receive the money and give up the note. This exception is to be strictly complied with, in order to charge the endorser, without a demand upon the maker." Woodbridge v. Brigham, 13 Mass. R. 556. This case was reported erroneously in 12 Mass. R. 403. See also Shaw v. Read, 12 Pick. R. 132; Sullivan v. Mitchell, 1 N. C. Law Rep. 482.

In a case in New York, where a note was made payable at a particular bank, and a demand was made on the maker personally and not at the bank, and no objection was made to the demand, it was held that the demand was sufficient. This, however, was not an action against an endorser, but was a case in which one partner having given his own note for a partnership debt, the question was, the note being unpaid, whether the holder had used such diligence to obtain payment of the note, as would enable him to maintain a suit for the original demand against the partnership. Herring v. Sanger, 3 Johns. Cas. 71.]

(14) Ambrose v. Hopwood, 2 Taunt. 61. In an action against the drawer of a bill, the declaration stated the bill to have been accepted by the drawee, payable at Messrs. Freeman's and Co., No. 6, Church Street, Bermondsey, Southwark, and averred that the bill was in due manner presented to them for payment, (not saying in *Church Street*, &c.) and dishonored. On special demurrer for other causes (which were abandoned) it was contended that there was no due averment of

If such house be mentioned in the body of a note, a presentment there is necessary even to charge the maker. (15)

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a presentment for payment, and that this objection, which was *not one of the causes* assigned, went to the substance of the case. The Court held the objection fatal, but permitted the plaintiff to amend on payment of costs.

See Garnett v. Woodcock, 1 Stark. 475.

(15) Sanderson v. Bowes and others, B. R. Mich. 52 Geo. 3. In an action on twelve country bank notes, for 1*l.* 1*s.* each, issued by the defendants from their banking-house at Workington, the declaration contained a count upon each note, stating that the defendants made a certain promissory note, "and thereby, on demand, promised to pay at the banking-house at Workington, to one R. N. or bearer," the sum of 1*l.* 1*s.*; and that thereby the defendants became liable, and promised to pay, according to the tenor and effect of the note. There was, however, no averment of a presentment for, or demand of, payment at the banking-house; but only the usual allegation, that the defendants, "although often requested," (without saying where) had refused to pay. To these counts there was a general demurrer and joinder; and after argument, the Court held, that there being no privity between these parties but in respect of the note, and that being a contract to pay at a particular place, a demand of payment at that place was in the nature of a condition precedent to the plaintiff's right to recover; and there being no averment of such demand, the defendants were entitled to judgment; and they gave judgment accordingly.

Dickenson v. Bowes, 16 East, 110. Action against the makers on fifty-six one-guinea notes; they were dated Workington Bank, and ran thus: "On demand I promise to pay at the banking-house here, to R. W. or bearer, the sum of one guinea, value received." Proof was given that thirty-two were presented for payment at the banking-house at Workington, and payment refused; but there was no such proof as to the other twenty-four, and on point saved, the Court held that plaintiff could only recover in respect of the thirty-two, and judgment accordingly.

Howe v. Bowes, 16 East, 112. Action on a similar note for five guineas against the makers: instead of averring presentment, plaintiff alleged that defendants became insolvent, and ceased and wholly declined and refused to pay, at the banking-house aforesaid, the sum specified in any note issued by them, and he proved that the shop was shut up and no notes paid there for some time before the action; the jury considered this proof as making out the averment, and verdict for plaintiff: and on rule nisi to set aside the verdict, and cause shown, the Court thought the verdict right; the shutting up the shop was in substance a refusal to make any payments there; rule discharged. But on error, the Exchequer chamber thought the allegations in the declaration not sufficient to excuse a presentment, and reversed the judgment. 5 Taunt. 30.

[But it has been held in New York, that a presentment of a bill of exchange at the place where it is payable, is not necessary in order to charge the acceptor. In an action against the acceptor of an inland bill made payable at the Bank of Utica, the declaration did not state any presentment for payment at the bank; and was demurred to on

that account. Spencer C. J. delivered the opinion of the Court. "I must think that the time and place of payment are merely modal, forming no essential part of the contract; that it is incumbent on the defendant whether the payee was at the place at the time appointed or not, to show in his defence, that he was there ready and willing to pay, and that the payee did not come, &c.; that the consequences of the absence of the payee under such circumstances, unless he makes a subsequent special demand, and there be then a refusal, are merely that he must be content with receiving the sum originally payable, and if he sue without having made a special demand, he loses all claim to damages and costs, and will himself be subject to them. This I consider not only entirely equitable between the parties, but the old and settled law of the land, and such was the opinion of the Court in Foden v. Sharp," (4 Johns. R. 183, which see.) Yates & Platt, Js. concurred; Van Ness and Woodworth, Js. dissented. Judgment for plaintiff. Walcott v. Van Santvoord, 17 Johns. R. 248.

The authority of the preceding case is fully recognised in Caldwell v. Cassidy, 8 Cowen, 271. This was an action against the maker of a note payable 60 days after date at the Franklin Bank. The defendant pleaded that he was, at the time and place of payment mentioned, ready and willing to pay the money, and had ever since been, and is now ready and willing to pay at the bank; but that the plaintiff never demanded payment, nor presented the note for payment at the bank. On demurrer the Court gave judgment for the plaintiff. Savage C. J. in giving the opinion of the Court, says, "The rule of this Court must be considered settled in the case of Walcott v. Van Santvoord; that when a promissory note is payable at a particular place on a day certain, the holder of the note is not bound to make a demand at the time and place, by way of condition precedent to the bringing of an action against the maker. But if the maker was ready to pay at the time and place, he may plead it as he would plead a tender, in bar of damages and costs, by bringing the money into court. In the case of a note payable on demand at a certain place, a bank note, for instance, I apprehend a demand would be necessary, and must be averred."

In U. S. Bank v. Smith, 11 Wheat. 175, Washington J. says, in giving the opinion of the Court, "We are strongly inclined to think, that, as against the maker or acceptor of such a note or bill, [that is, one made payable at a particular place,] no averment or proof of demand of payment at the place designated would be necessary." The point, however, was not directly decided by the Court.

In Massachusetts, also, it is held, that where a note is made payable at a particular place, no presentment at that place is necessary in order to charge the maker. Ruggles v. Patten, 8 Mass. R. 480.

So in New Jersey it has been expressly decided, that in an action against the maker of a note payable at a particular place, it is not necessary either to allege presentment at that place in the declaration, or to prove it on the trial. Weed v. Van Houten, 4 Halst. R. 189.

So in Ohio, New Hampshire, Maryland, and Connecticut it is held, that where a note is payable at a time and place certain, no presentment there is necessary in order to charge the maker. Conn v. Gano, 1 Hammond's Ohio R. 483; Eastman v. Fifield, 3 N. H. R. 333; Bowie v. Duvall, 1 Gill & Johns. 175; Eldred v. Hawes, 4 Conn. R. 465.

So in Tennessee, a note payable at a particular place need not be presented at the place at the time of payment in order to charge the maker. The only effect of not then demanding payment is that no

And so it is if it be printed on the note, though by way of memorandum only. (16)

And if such house be mentioned in an acceptance, and the acceptance make the bill payable there "and not otherwise or elsewhere," a presentment there will be necessary to charge the acceptor. (17)

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interest will subsequently accrue upon the note. M'Nairy v. Bell, 1 Yerger, 502.

But it is a good defence to an action against the maker of a note payable at a place certain, that he had the money there at that day, and has always been ready to pay there, if he brings the money into court. But a plea of these facts without a *profert in curia* is bad. Carley v. Vance, 17 Mass. R. 389.

In Louisiana it is held, in conformity with the English decisions, that where a note is made payable at a particular place, a presentment at that place is necessary even to charge the maker; but that the presentment need not be made on the day the note falls due, but may be made at any time afterwards. The chief reason which seems to be relied on in this case is the inconvenience which it would be to a merchant who had provided funds for the payment of a note at one place if he were liable to be called on at another. Mellon v. Croghan, 15 Martin, 423. S. P. Smith v. Robinson, 2 Miller, 405. The law is the same in Indiana. Palmer v. Hughes, 1 Ind. R. 328.

Where, however, a note was made payable at the counting-house of a commercial partnership in New Orleans, and before the commencement of the suit, the firm had failed and had no counting-house, it was held that no presentment was necessary in order to charge the maker. Erwin v. Adams, 2 Miller, 318.

A note signed by two persons jointly and severally, in which it was expressed that payment was to be demanded at their dwelling-houses, was presented to both at the barn-yard of one of them, and no objection was made by either as to the place where payment was thus demanded. It was held, that the demand was sufficient in an action against them. Baldwin v. Farnsworth, 1 Fairf. 414.]

(16) Trecothick v. Edwin, 1 Stark. 468. The whole of a note, except the names of parties, sum, and date, was printed; and at the bottom was printed, "at Barclay, Tritton, and Co.'s." In an action against the maker, a question was made whether it was necessary to prove a presentment at Barclay and Co.'s; and Lord Ellenborough held it was, because the stipulation, being printed, must have been on the note at the time the note was made, and was to be considered part of the note. The proof was then given, and the plaintiff had a verdict.

(17) See 1 & 2 Geo. IV. antè, p. 182.

[The following cases are contained in the fourth London edition of this work, though omitted in the fifth. They may be interesting to readers in the United States.

Callagan v. Aylett, 3 Taunt. 397; 2 Campb. 549. In an action against the acceptor of a bill, it appeared that the bill was accepted, payable at Messrs. Ramsbottoms', bankers, London; and two objections were taken to the plaintiff's right to recover; first, that there was a variance between the acceptance proved, which was a special one,

But, where a particular house is mentioned in a note by way of marginal memorandum only, presentment at that house may not be necessary to charge the maker; (18)

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and that averred in the declaration, which was general; and secondly, that there was no proof of a presentment for payment at the place where the bill, by the acceptance, had been made payable. A verdict was found for the plaintiff, subject to the opinion of the Court upon these points, which were reserved. A rule nisi to set aside this verdict and enter a nonsuit, was obtained; and after cause shown, the Court, (Mansfield C. J. absente) held, that the place where a bill is made payable must be considered as part of the contract between the acceptor and the holder; that this was a special and qualified acceptance, binding the acceptor to pay at Ramsbottom's, and not universally. They said, it seemed fair that when a party had provided funds at his banker's for the due satisfaction of a bill, he should be allowed to protect himself from the risk of being arrested upon it by a malicious creditor. They referred to Parker v. Gordon, 7 East, 385; and said it could make no difference (for this purpose) whether the action were against the drawer or acceptor. Rule absolute.

Gammon v. Schmoll, 5 Taunt. 344. Bill directed to defendant, Bath: the declaration alleged that he accepted it, "payable at Batson's, London;" there was no averment of a presentment at Batson's. Demurrer on that ground; and after argument, the Court held the averment essential, and the declaration, for want of it, bad.

Rowe v. Young, 2 Brod. 165. Bill directed to defendant at Torpoint, Devon: the declaration alleged that he accepted it, payable at Sir John Perring and Co.'s, bankers, London: the action was by an endorsee; and on error, objection that there was no averment of presentment at Sir John Perring's, and the House of Lords held the objection fatal; and judgment for plaintiff below reversed.

Bishop v. Chitty, Str. 1195. Chitty, the drawee of a bill, wrote upon it, by way of acceptance, "Messrs. Caswell and Mount pay this bill when due for Thomas Chitty:" it became due 2d of January, 1741: Caswell and Mount paid till the 19th, when they stopped; and no notice was given to Chitty of its non-payment till the 21st; and Lee C. J. held that Chitty was discharged, for though the holder might have refused this acceptance, he had agreed to it, and it was in nature of a draught, which is considered as payment when a reasonable time to receive it in has elapsed. However, in Smith v. De la Fontaine, B. R. T. 25 Geo. III., where an action was brought against the acceptor of a bill upon an acceptance to pay at his banker's, and the plaintiff could not prove a presentment at the banker's, notwithstanding which the jury found for him; the Court held the proof unnecessary, and refused to grant a new trial. Bishop v. Chitty, was cited.]

(18) In Wild v. Rennards, 1 Campb. N. P. C. 425. n. Bayley J. held that if a promissory note be made payable at a particular place, there is no necessity for proving, in an action against the maker, that it has been presented there for payment. And upon this case being cited in Sanderson v. Bowes, Bayley J. said, that as far as he could recollect, the place was not incorporated with the body of the note: it was only mentioned in a memorandum at the bottom. And in Callaghan v. Ay-

Nor is it (since 1 & 2 Geo. IV. c. 78., on acceptances made after 1st of August, 1821,) to charge an acceptor, where the acceptance mentions that house without further expressions to make it the exclusive place of payment. (19)

In an action against the acceptor upon a bill payable, by the language of the bill, at a particular place, a presentment at that place need not be averred nor proved: the statute 1 & 2 Geo. IV. c. 78, applies equally, whether the bill is made payable at a particular place by the language of the bill, or by the language of the acceptor. (20)

And where a bill is so accepted or framed as to make it necessary even to charge the acceptor that it should be presented for payment at a particular place, a neglect to present it there the very day it becomes due will not discharge the acceptor; unless the money be lost in consequence of such neglect. (21)

If the money be lost in consequence, it may. (21)

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lett, 2 Campb. N. P. C. 451, and Sanderson v. Judge, 2 H. Bl. 509, the same distinction is taken.

Price v. Mitchell, 4 Campb. 200. At the bottom of a note was written, "At Vere and Co.'s, 77, Lombard Street." In an action against the maker, it was urged that plaintiff ought to prove a presentment at Vere and Co.'s: but as the direction was only at the foot of the note, and not part of the note, Gibbs C. J. thought otherwise, and the plaintiff had a verdict.

(19) See 1 & 2 Geo. IV. antè, p. 182.

(20) Selby v. Eden, 3 Bingh. 611. Action against acceptor on bill drawn payable in London: there was no averment of presentment in the declaration, nor proof of any at the trial: the objection to the want of proof was made at the trial, and over-ruled: the objection to the want of averment was made in arrest of judgment; but on rule nisi, and cause shown, and time to consider, the Court held the statute applied, and the averment was unnecessary. Rule discharged.

Fayle v. Bird, 6 Barn. & Cr. 531. Action against acceptor on bill requiring defendant, two months after date, to pay to plantiff's order in London 59*l.* 12*s.* 6*d.*: the acceptance was "accepted payable at W. Metcalfe's, Esq., Coal Exchange, London:" presentment at Metcalfe's was averred, but not proved, and on that ground nonsuit; but on rule nisi to enter verdict for plaintiff, and cause shown, the Court thought Selby v. Eden decisive, and observed that uniformity of decision was in all cases important, especially upon questions affecting such negotiable instruments. Rule affirmed.

Vide post.

(21) Rhodes v. Gent, 5 B. & A. 244. In an action on an acceptance, payable, when due, at Messrs. P. and H.'s, bankers, London, it was proved that the bill was presented for payment at Messrs. P. & H.'s,

[Where a bill by the terms of the acceptance is made payable at a particular place, a presentment at that place is necessary to charge the drawer or endorser, notwithstanding 1 & 2 Geo. IV. c. 78, which applies only to the acceptor. (*u*)]

If a check upon a banker be lodged with another banker, a presentment by the latter at the clearing house is (22) sufficient.

[If a note be made payable "at the house of A. B.," a presentment at A. B.'s office is sufficient. (*v*)

If the maker of a note appoint a particular place at which it may be presented for payment, a presentment for payment at that place will be sufficient to charge an endorser, (*w*) even if the place of payment be appointed by the maker by a memo-

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but that such presentment was not until several days after the bill became due. Abbott C. J. thought the plaintiff nevertheless entitled to a verdict: and on motion to set aside the verdict, all the judges in Court, viz. Abbott, C. J., and Holroyd and Best Js., held, that as the bill had been presented at the banker's, and the non-payment arose not because the bankers had failed, but from some other cause, and the acceptor was not prejudiced by the postponement of the presentment, such postponement was no defence to him; and a rule was refused.

[(*u*) Gibb v. Mather, 1 M. & Scott, 387; 1 Bing. 214; 2 Cromp. & Jer. 254.]

(22) See Robson v. Bennett, post, n. (50).

[(*v*) Miller v. Hennen, 15 Martin, 587. Action against the endorser of a note payable at the maker's "elected domicile, at the house of Alfred Hennen in New Orleans." The evidence showed a presentment at the office of A. Hennen, which was in a different part of the city from his dwelling-house. The presentment was held sufficient. Porter J., in giving the opinion of the Court, said, "The expression is indefinite, and the holder had certainly more reason to presume it was the house where Mr. Hennen generally was, and his business was transacted, than the private residence appropriated to the use of his family." S. P. State Bank v. Hennen, 16 Martin, 227.]

[(*w*) In an action against the endorser of a note, it appeared that notices according to the forms of banks in Boston were left for the maker and endorser, at one Metcalf's shop in Cornhill, Boston, by direction of the maker and endorser respectively. The Court held the demand and notice sufficient. Curia. "The agreement of the promiser that notice left for him at a certain shop in Boston should be equivalent to a more formal demand upon him, removed the necessity of resorting to his house or place of business, to make such demand; and his failure to pay on such notice rendered the endorser, who had seasonable information, absolutely liable." State Bank v. Hurd, 12 Mass. R. 172. See also Whitwell v. Johnson, post.]

randum on the note made subsequently to the endorsement, and without the knowledge or consent of the endorser. (*x*)

If the maker and endorsers of a note agree by parol with the holder, that it shall be presented for payment at a particular place, a presentment at that place will be sufficient to charge the endorsers, without any presentment to the maker personally. (*y*)

A note's being dated at a particular place, does not make it payable there; but it must be duly presented to the maker, in order to charge an endorser. (*z*)

[(*x*) Woodworth endorsed a note made by Kane, payable in sixty days, for Kane's accommodation. After the note was made and endorsed, Kane, without the consent or knowledge of Woodworth, wrote in the margin, "Payable at the Bank of America, James Kane." In a suit against Woodworth as endorser, a presentment at the Bank of America and notice to him were proved; and the Supreme Court of New York held that he was liable. Spencer C. J. delivered the opinion of the Court. "On the ground that the memorandum in the margin of the note in this case, did not alter the contract, as between the immediate parties to the note: as it was an appointment of the place where the maker would pay the note: and as I think, upon authority that has not and cannot be shaken, the maker had a right to make such appointment, a demand of payment at the Bank of America was sufficient." But he questioned whether appointing a very distant place of payment without the knowledge of the endorser, might not be a fraud upon him, so as to discharge him from his liability. Bank of America v. Woodworth, 18 Johns. R. 315.

This case was afterwards reversed by the Court of Errors, on the ground, as it seems, that the memorandum made by Kane was a material alteration of the contract, and so discharged the endorser; or that if the alteration was not material, and the original contract remained untouched, then there was no sufficient demand on the maker. The Chancellor, Kent, was in favor of affirming the opinion of the Supreme Court. His opinion contains a very elaborate examination of the cases. He took the following positions: 1. That the plaintiffs being *bonâ fide* endorsees, who received the note without knowing of any dissent to the memorandum on the part of the endorser, were only required to make a demand at the place named in the memorandum. 2. That the note endorsed was like an inland bill, and therefore that the maker of the note after the bill was returned to him, had a right to appoint a place for payment, as none was mentioned in the note, in the same manner as the acceptor of a bill might designate a place for payment. 3. That the memorandum was no part of the contract, but was sufficient to justify the holder in calling at such a place for payment, and being refused he had a right to look to the endorser. Eighteen senators were for reversing; nine concurred with the chancellor. Woodworth v. Bank of America, 19 Johns. R. 391.]

[(*y*) Brent's Executors v. Bank of the Metropolis, 1 Pet. Sup. C. R. 89.]

[(*z*) Galpin v. Hard, 3 M'Cord, 394. See also Fisher v. Evans, 5 Binn. 541.]

Where a bill is drawn upon a person resident in A., but is made payable in B., a large city, without specifying any particular place in B., it is sufficient for the holder, in order to charge the prior parties, either to present the bill to the drawee for payment at his place of residence, or to have the bill at the place where it is payable on the day of payment, and there have it protested without making any inquiry for the drawee. (*a*)

A presentment to a general agent or attorney of the maker of a note, has been held not to be sufficient to charge an endorser, the note itself not directing a presentment of this kind,

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[(*a*) An action was brought against the endorsers of a foreign bill drawn upon Rathbone, Hughes, and Duncan, merchants at Liverpool, payable sixty days after sight in London. Acceptance had been refused, and the declaration averred that when the bill was due, it was presented to the drawees at Liverpool, who refused to pay the same, and that it was then protested at Liverpool for non-payment. Demurrer, because the declaration did not allege a presentment for payment in London, or diligence to find any person to whom to present the bill for payment, or a protest in London. Kent C. J. delivered the opinion of the Court. "A good cause of action arose upon the protest for non-acceptance; and were we to admit that the subsequent demand of payment and protest for non-payment were void acts, by being made at Liverpool, that part of the declaration alleging the subsequent demand and protest might be rejected upon demurrer as surplusage. But we are of opinion that as no place of payment in London was designated, the demand of payment and protest for non-payment, were well made upon the drawees personally, at Liverpool. A general refusal to pay was a refusal to pay according to the face of the bill. It was equivalent to a refusal to pay in London." Mason v. Franklin, 3 Johns. R. 202.

In another action against the drawer of a bill drawn upon Rathbone, Hughes, and Duncan of Liverpool, payable in London, in which case also the bill was not accepted, the declaration did not state a presentment for payment to the drawees in Liverpool, but averred that the bill when payable was protested at London for non-payment, and that the holders did not know where to present the same for payment in London. Demurrer, because the plaintiffs did not allege a presentment of the bill to the drawees for payment, or any endeavors to find the drawees or inquiries made for them. Kent C. J. delivered the opinion of the Court. "It was not incumbent upon the plaintiffs to state that inquiry was made in London for the drawees. *Lex neminem cogit ad vana seu inutilia.* An attempt to search for them in such a city as London would have been without any object or effect. Nor were the holders bound to go elsewhere to seek the drawees, as the bill had directed the payment to be in London. They were in London on the day of payment ready to receive payment; and they did all that they were enabled to do, they caused the bill to be there protested." Boot v. Franklin, 3 Johns. R. 208.]

and the maker having given no particular orders that it should be so presented. (*b*)]

A presentment should be made at a seasonable time.

If by the known custom of any place, bills and notes be only payable within limited hours, a presentment *there* out of those hours is unseasonable.

And so is a presentment out of the hours of business to a person of a particular description (as a (23) banker), in a place where, by the known custom of that place, all persons of his description begin and leave off business at stated hours.

But to an acceptor not so circumstanced (24), eight o'clock in the evening is not an unseasonable hour for making a presentment for payment.

[(*b*) Louisiana State Ins. Co. v. Shamburgh, 14 Martin, 511.]

(23) Parker v. Gordon, 7 East's Rep. 385. The drawee accepted the bill, payable at Davison and Co.'s, his bankers: at the part of the town where Davison and Co. lived, bankers shut up at six o'clock. The bill was not presented for payment until after six, when the shop was shut up, and the clerks gone. In an action against the drawer, Lord Ellenborough held that this was not a good presentment, and non-suited the plaintiff: and on motion for a new trial, the Court held, that if a party took an acceptance payable at a banker's, he bound himself to present the bill during the banking hours; and therefore rule refused.

N. Lawrence and Le Blanc Js. said, the holder was not bound to take such an acceptance.

Elford v. Teed, 1 Maule and Selw. 28. The drawee accepted a bill, payable at his banker's, Hodsoll and Co.; the only evidence of a presentment was by a notary's clerk, between half after six and seven, in the evening: the banking-house was then shut, and the answer at the private door was "no orders." Lord Ellenborough allowed plaintiff to take a verdict, with liberty to defendant to move to enter a nonsuit; rule nisi: and on cause shown, the Court thought this presentment too late; that it furnished no ground for presuming that there had been a prior presentment by the holder within the banking hours: but, that plaintiff might have an opportunity of proving such a presentment, they allowed him to have a new trial on his paying the costs. See, however, Garnett v. Woodcock, post.

(24) Barclay v. Bailey, 2 Campb. N. P. C. 527. This was an action against the drawer of a bill. At eight o'clock in the evening of the day on which it became due, it was presented at the house of the acceptor in London, for payment; and the answer given was, that the acceptor had become bankrupt, and had removed into another quarter of the town. It was, however, proved that a person had been stationed at the house from nine o'clock till four, for the purpose of taking up this bill, but that it was not presented within those hours. Lord Ellenborough held, that the acceptor being a common trader, not a banker, the presentment was good; and said, that eight o'clock

CHAP. VII.

Sect. 1. *Presentment, obligation to make.*
——— *where.*
——— *within what Hours.*
——— *for Acceptance.*
——— *for Payment.*
——— *by whom.*
——— *to whom.*
——— *of Bills, &c. payable on Demand.*
——— *of Bills, &c. entitled to Grace, &c.*
——— *Mode of computing the Time.*
——— *where the Time is computed by the Old Style.*
——— *or by the Usance.*
——— *if excused by Bankruptcy, or other Incapacity of Drawee or Maker.*
——— *right to insist on—how waived or modified.*
2. *Notice of Non-acceptance.*
——— *of partial or conditional Acceptance.*
——— *from whom.*
——— *Form of.*
——— *Protest.*
——— *at what Time.*
——— *at what Time to be given.*
——— *in what Manner—verbal.*
——— *written.*
——— *by Letter: Direction.*
——— *to whom—Bankrupt.*
——— *one of several Partners.*
——— *Drawer of Bill.*
——— *Payee or Endorser.*
——— *Persons not Parties to the Bill or Note.*
——— *Representatives of any of such Parties.*
——— *want of—when excused—by part Payment or Promise.*

Sect. 2. *Notice, Want of—when excused—by want of Effects in the Drawee's Hands, or other Cause.*
———*to Acceptor.*
———*to Maker of Note.*

The receipt of a bill or note implies an undertaking from the receiver, to (1) every party to the bill or note who would be entitled to bring an action on paying it, to (2) present in proper time, the one, where necessary, for acceptance, and each for payment; to (3) allow no extra time for payment; and to give (4) notice without delay to such person of a failure in the attempt to procure a proper acceptance or payment; and a (5) default in any of these respects will discharge such person from all responsibility on account of a non-acceptance or non-payment, and will, unless (6) the bill or note were on an improper stamp, make it (7) operate as a satisfaction of any debt or demand for which it was given.

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(1) Vide post.
(2) Vide post.
[A demand of payment of the maker of a note has no effect to charge the endorser, if the person making the demand does not have the note with him at the time. Eastman v. Potter, 4 Verm. R. 313.
In Tennessee, an order for the payment of money is not considered as a bill; and a person receiving such an order from the drawer, does not lose his claim against him for the debt on account of which it is given, by a neglect of presentment and notice, unless the drawer can prove that he has been injured by such neglect. Harwell v. M'Cullock, 2 Overt. 275.]
(3) Vide Tindal v. Brown, post, note 82.
(4) Vide post, Sect. 2.
(5) Vide post, Sect. 2.
Syderbottom v. Smith, Str. 649. In an action against the endorser of a note, Eyre C. J. of the Common Pleas, directed the jury to find for the defendant, because the plaintiff had not proved diligence to get the money from the maker; being of *the old* opinion that the endorser only warrants upon default of the maker.
Gee v. Brown, Str. 792. The holder of an inland bill gave the acceptor time, by intervals, from 14th May, when the bill became due, to 7th of June, and then sued the drawer; but there being no notice to him, Eyre C. J. held the loss ought to fall on the plaintiff.
[So a letter put into the post-office, addressed to the drawee of a bill or maker of a note, requesting payment, is no presentment. Whittier v. Graffam, 3 Greenl. 82.]
(6) See Wilson v. Visar, ante p. 87.
(7) By 3 & 4 Ann. c. 9. § 7. It is enacted, that if any person doth accept any such bill of exchange, for and in satisfaction of any former.

[The obligation of the holder of a bill or note to present it, and give notice of its dishonor and the consequences of neglect, are the same, whether the parties be merchants or not. (*a*)

The endorser of a note payable to bearer is not liable, unless a due presentment has been made to the maker. (*b*)

Where a bill or note is endorsed after it is due, though the strict rules as to demand and notice do not apply, yet in order to charge the person then endorsing it, a subsequent demand must be made on the drawee or maker, within a reasonable time, and notice of the dishonor given without delay to the endorser. (*c*)

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debt, or sum of money formerly due unto him, the same shall be accounted and esteemed a full and complete payment of such debt, if such person accepting of any such bill for his debt doth not take his due course to obtain payment thereof, by endeavoring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-payment thereof.

[See Penn v. Poumeirat, 14 Martin, 541.]

[(*a*) Penn v. Poumeirat, 14 Martin, 541.]

[(*b*) Galpin v. Hard, 3 M'Cord, 394.]

[(*c*) Ecfert v. Des Coudres, 1 S. Car. R. 69; Rugely v. Davidson, 2 S. Car. R. 33; Dwight v. Emerson, 2 N. Hamp. R. 159; M'Kinney v. Crawford, 8 Serg. & Rawl. 351; Berry v. Robinson, 9 Johns. R. 121; Hill v. Martin, 12 Martin, 177; Poole v. Tolleson, 1 M'Cord, 199; Stockman v. Riley, 2 M'Cord, 398; Houston v. Frazier, Harper's R. 10; Course v. Shackleford, 2 Nott & M'Cord, 283. M'Ilhenny v. Jones, 6 Har. & John. 256, is contra.

Swift C. J. said, "The endorsement of a bill or note after due is equivalent to drawing a new bill payable at sight; and demand must be made by the endorsee of the drawee of the bill or maker of the note, and notice given to the endorser, as in cases of bills payable at sight." Bishop v. Dexter, 2 Conn. R. 419.

A presentment in such case a few weeks after the note was endorsed, and notice of the dishonor two or three months after to the endorser, were, in one case, held to be sufficient to charge him, the evidence showing that the parties at the time of the endorsement, did not contemplate an immediate presentment. Van Hœsen v. Van Alstyne, 3 Wend. 75.

It seems to be doubted, in the case of Nash v. Harrington, 1 Aikens, 39, whether the same strictness in giving notice is required in the case of a bill or note endorsed after due, as in the case of one endorsed before it is due.

When the same case came up again, however, the Court seemed to think the same strictness was necessary, and held that where a note was endorsed long after it was due, a presentment seven days after the endorsement was too late, the holder and maker residing in the same place. The Court said the demand should have been made in a day or two at farthest. Nash v. Harrington, 2 Aikens, 9.]

And in such a case the want of a proper presentment and notice, is not excused by the holder of the note using due diligence to collect it of the maker, even if the endorser knows that the money has not been paid by the maker. (*d*)

It has been doubted whether an action could be brought against an incorporated bank on one of its own notes, not expressed to be payable at any particular place, without making a previous presentment for payment at its banking-house. (*e*)

But the better opinion is, that no such presentment is necessary. (*e*)]

The presentment is to be made where the bill or note is payable.

[Where a bill, payable at A., is drawn upon persons domiciled at B. and no place is appointed for presentment at A., presentment can only be made at the domicile of the drawers. (*f*)]

[(*d*) M'Kinney v. Crawford, 8 Serg. & Rawl. 351.]

[(*e*) In the case of the Bank of Niagara v. M'Cracken, the defendant, being sued as maker of a note, was allowed to set off notes of the bank which he held, and which he had tendered in payment of his own note, without proving a presentment of them for payment; and Woodworth J., who delivered the opinion of the Court, said, that as the notes were not payable at any particular place, an action might have been sustained on them without a demand at the bank. 18 Johns. R. 493. But in a subsequent case, the Court appear to consider the question as to the necessity of a presentment of a bank note, in order to charge the bank, as still open; and they consider that M'Cracken's having tendered the notes of the bank in payment of his own note, was equivalent to a demand of payment. Jefferson County Bank v. Chapman, 19 Johns. R. 322.

A still later case, however, Haxtun v. Bishop, 3 Wend. 13, appears to confirm the opinion given in Bank of Niagara v. M'Cracken, Savage C. J. expressing a decided opinion that no demand on a note payable on demand at the bank, was necessary previously to bringing a suit; but that if the bank be solvent, "a defence will be made out which will subject the plaintiff to costs," if the defendant pleads his having money ready to pay at the place of payment where the suit was brought, and brings the money into Court.

In New Jersey it is held, that no presentment is necessary, before bringing a suit against a bank. State Bank v. Van Horn, 1 South. R. 382.]

[(*f*) Where a bill drawn in America on persons at Liverpool, and payable in London generally, was accepted by persons in London for honor of the drawers, suprà protest for non-acceptance in the following form: "Accepted suprà protest for honor of L. & Co., and will be paid on their account if regularly protested and refused when due,"

If the drawee or maker cannot be found at the place where the bill or note is payable, and it appear that he never lived there, or has (8) absconded, the bill or note is to be considered as dishonored, especially if he cannot be heard of at any of the banking-houses there (9); if he have only removed, the holder (10) must endeavor to find out to what place he has removed, and make the presentment there.

[If the maker of a note in which no place of payment is specified, after it is given, removes out of the State of his residence, either into a foreign country or one of the other States, a presentment to him is not necessary. (*g*)

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the Court of King's Bench held, that the bill was properly presented when due to the drawees at Liverpool, and properly protested there,—the protest was properly made where the bill was presented, and the presentment could not be made at any other place than the residence of the drawees; because no other place was appointed for the purpose. Lord Tenterden, C. J., Littledale and Parke, Judges, thought the presentment was made necessary by the particular form of the acceptance; because payment could not be refused until it was demanded; but Bayley J. held it necessary on the general principle, (established by Williams v. Germaine, antè, p. 159) that where a bill is accepted for the honor of the drawer, presentment for payment to the drawee is necessary. Mitchell v. Baring, 1 Mood. & M. 381.]

(8) Anon. Lord Raym. 743. "The custom of merchants is, that if B., upon whom a bill of exchange is drawn, absconds before the day of payment, the man to whom it is payable may protest it, to have better security for the payment, and to give notice to the drawer of the absconding of B." Proved by merchants at Guildhall, Tr. 6 W. & M., before Treby C. J.

(9) See Hardy v. Woodroffe, post.

(10) Collins v. Butler, Str. 1087. The maker of a note shut up his house before the note became due; and in an action against an endorser, the question was, whether the plaintiff had shown sufficient in proving that the house was shut up?—and Lee C. J. thought not, but that he should have given in evidence that he inquired after the maker or attempted to find him out. Vide Bateman v. Joseph, post, note (121).

[Where the residence of the maker of a note is not known to the holder, the presumption is, that he resides at the place where the note is dated, and that is the proper place to make inquiry for him. Duncan v. M'Cullough, 4 Serg. & Raw. 480.

See also Rugely v. Davidson, 2 S. Car. R. 33., and Galpin v. Hard, 3 M'Cord, 394, as to the diligence to be used to make a demand upon the maker of a note, and to ascertain the place to which he has removed.]

[(*g*) In an action against the endorser of a note, it appeared, that when the note was made, and until within ten days of its falling due, the maker was a housekeeper in the District of Columbia, but that he

But if he has only removed to another place within the same State, the holder is not excused from making a presentment. (*h*)

Where no place of payment is specified, in a bill or note, a presentment at the residence of the drawee or maker, is sufficient, even if he be out of town at the time. (*i*)

So a presentment at his place of business is sufficient, if made in business hours, even if it be shut, and no person left there to answer inquiries. (*k*)

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then removed into the State of Maryland, to a place about nine miles out of the district. The holder of the note did not know the place to which the maker had removed. A notary called to present the note at the former place of residence of the maker, and protested it for non-payment; but it did not appear that any inquiries were made to ascertain where he then resided. Johnson J. delivered the opinion of the Court. "The party must be considered as lying under the same obligations, as if, having made inquiry, he had ascertained that the maker had removed to a distance of nine miles, and into another jurisdiction. We think that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand. No other rule can be laid down which will not leave too much latitude as to place and distance." M'Gruder v. Bank of Washington, 9 Wheat. R. 598.

See also Anderson v. Drake, infrà.

See also Louisiana State Ins. Co. v. Shamburgh, 14 Martin, 511; Widgery v. Munroe, 6 Mass. R. 449; Putnam v. Sullivan, 4 Mass. R. 46; Gillespie v. Hannahan, 4 M'Cord, 503; Cummings v. Fisher, Anth. N. P. 1; Galpin v. Hard, 3 M'Cord, 394; Hepburn v. Toledano, 10 Martin, 642.]

[(*h*) In an action against the endorser of a note, he pleaded specially that the maker of the note had, shortly after the making thereof, and before it became payable, removed from the city of New York to Kingston, in Ulster county, in the same State, there permanently to reside, which was well known to the plaintiff, and that no demand had been made upon the maker. Demurrer. Thompson C. J. delivered the opinion of the Court. "In a case decided in this Court, the drawer of the note had removed to Canada; the note was drawn and dated at Albany, though not made payable at any particular place, it was held that a demand at Albany was sufficient to charge the endorser." "I am inclined to think, where a note is not made payable at any particular place, and the maker has a known and permanent residence within the State, the holder is bound to make a demand at such residence. As the demurrer, therefore, in this case admits the permanent residence of the maker to have been at Kingston, when the note fell due, and that known to the plaintiff, he was bound to demand payment of the note at that place; and not having done so the endorser is discharged." Judgment for defendant. Anderson v. Drake, 14 Johns. R. 114. See also Gillespie v. Hannahan, 4 M'Cord, 503.]

[(*i*) Moodie v. Morrall, 1 S. Car. R. 367.]

[(*k*) Shed v. Brett, 1 Pick. 413.]

If the holder of a foreign bill carry it to the place where it is payable, he ought to present it for acceptance without delay. (*k*)]

Upon a presentment for acceptance, the bill should be left with the drawee (34) twenty-four hours, unless in the interim he either accept or declare a resolution not to accept.

But a bill or note must not be left (unless it be paid) on a presentment for payment; if it be, the presentment is (35) not considered as made until the money is called for.

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what was reasonable time was considered to be a question of law for the Court, not of fact for the jury, the facts being proved.

In determining this question the situation of the parties,—as, where they were when the bill was drawn,—whether the payee is to be himself the bearer,—the distance between the place of drawing the bill and that on which it is drawn,—delay arising from the payee's sickness, or other accident not arising from his misconduct,—may all properly be considered. The bill, in this case, was drawn in the city of New York, December 12, 1822, on parties at Richmond, Va., payable at three days' sight. It was understood, when the bill was drawn, that the payee, who resided about twenty miles from Richmond, and intended to return home immediately, was to present the bill himself. The payee, who was out of health at New York, continued so until his return home, where he arrived between January 1 and 6, 1823. He continued so unwell as not to be able to present the bill himself, but had it presented for acceptance by another person on January 10, when acceptance was refused. It was held that under the circumstances the presentment was in reasonable time. But whether the presentment would have been in reasonable time if the payee had been in good health, quære.]

[(*k*) Fernandez v. Lewis, 1 M'Cord, 322. Action against the drawer of a bill, drawn by him at Charleston, S. C. the 11th of June, on Bellany in New York, in favor of the plaintiff, payable three days after sight. The plaintiff sailed for New York in June, and on his arrival there resided with Bellany. The case does not show when he arrived in New York, though it may be inferred that he was there before the middle of July. The bill was protested for non-payment on August 24th, on which day Bellany failed, and notice was given to the defendant. The Court were very clear that the defendant was discharged from the neglect to present the bill for acceptance within a reasonable time.]

(34) Vide Mar. 2d ed. 16. Moll. b. 3. c. 5. s. 1. Lord Raym. 281.

(35) Hayward v. Bank of England, Str. 550. Hayward kept cash at the bank, and paid in a banker's note; the runner to the bank left it at the banker's the next morning, and called for the money in the afternoon, but in the interval the banker had stopped; and though this appeared to be the usual practice at the bank, King C. J. said, it was dangerous to suffer persons to deal with notes in that manner, and that the Common Pleas were of that opinion in the like case; and he directed the jury to find for the plaintiff, which they did. Sed vide Turner v. Mead, and Hoar v. Da Costa, post. p. 225.

[A demand of payment, by a person who has not the bill or note with him at the time, is not a sufficient presentment. (*l*)

A presentment by any person in possession of a bill or note *bonâ fide*, is sufficient to charge the parties to the instrument, and no letter of attorney or other writing from the proprietor of the bill or note, is necessary to give an authority to another person to make a presentment. (*m*)

A person's having a bill or note in his possession on the day and at the place of payment, is presumptive evidence of authority to demand payment. (*n*)

If a corporation draw an order for the payment of money on its treasurer, no action can be maintained against the corporation, without proving a presentment to the treasurer. (*o*)

If the maker of a note die before it becomes due, it is no excuse for not making a presentment. Inquiry should be made to ascertain his executor or administrator, and the presentment should be made to him, if found. If there be no executor or administrator, or he cannot be ascertained, by inquiry

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[(*l*) Freeman v. Boynton, 7 Mass. R. 483; Haddock v. Murray, 1 N. Hamp. R. 140.

It was held in a case in New Hampshire, where the note was in a bank a few rods from the house of the maker, that a letter sent to the maker's house informing him of this fact and requesting payment, was a sufficient presentment to charge an endorser. 1 N. Hamp. Rep. 80.]

[(*m*) Freeman v. Boynton, 7 Mass. R. 483; Bank of Utica v. Smith, 18 Johns. R. 230; Hartford Bank v. Stedman, 2 Conn. R. 489; Morris v. Foreman, 1 Dall. 193; Bachellor v. Priest, 12 Pick. 399.

A presentment of a note for payment was made by a notary public at the request of the endorsee, the Court said that there was no room for question that the demand was sufficient. Parker C. J. said, "The demand may as well be made by an agent, as by the principal, and there is no need of a power of attorney or any written instrument to constitute an agent for this purpose." Shed v. Brett, 1 Pick. 401.]

[(*n*) Agnew v. Bank of Gettysburgh, 2 Har. & Gill, 478.]

[(*o*) Where the selectmen of a town drew an order upon their town treasurer, it was held that no action could be maintained against the town, without proving a presentment for payment to the treasurer. Mellen C. J. delivered the opinion of the Court. "The case may be compared to that of a draft by a man on his banker; or a note payable at his banker's, or by his agent, in which cases it seems settled that the draft or note must be presented at the place appointed." Varner v. Nobleborough, 2 Greenleaf, 121.]

at the proper office, the note should be presented at the accustomed dwelling of the maker when alive. (*p*)

Where a note was signed "A. by B., his attorney," and A. was dead at the time it was signed, though this was not known to the other parties, it was held that a presentment to A.'s administrator when the note fell due, was sufficient to charge the endorser. (*q*)

On a similar note payable on demand, it was held that no presentment was necessary in order to charge the endorser. (*q*)]

The time when a presentment for payment must be made, depends upon the time when the bill or note is payable.

A bill or note payable on demand must not be kept locked up; if it be, the loss will fall on the holder. (36)

And it will be no excuse that it would not have been paid had it been presented sooner. (36)

If A. take a bill or note payable to bearer on demand for a pre-existing debt, and, instead of putting it into circulation or presenting it for payment in a reasonable time, keep it by him, and such bill or note be afterwards dishonored, the debt will be considered as extinct, and the loss will fall upon A. (37)

[(*p*) Price v. Young, 1 Nott & M'Cord, 438.

In Massachusetts, where the maker of a note died, and an administrator was appointed before the note became payable, the day of payment falling within a year from the time of his appointment, it was held that a holder might maintain an action against an endorser without proving a demand upon the administrator at the maturity of the note. This decision was on the ground that in Massachusetts the administrator is not obliged to pay any debt of the deceased, except such as are particularly privileged, within a year from the time of his appointment. Hale v. Burr, 12 Mass. R. 86.

But quære whether this reasoning be satisfactory, for the administrator might perhaps pay the note on presentment, though not compellable to do so.]

[(*q*) Burrill v. Smith, 7 Pick. 291.]

(36) Breching v. ————, Holt, 315. Plaintiff took of defendant at Tunbridge, on the 5th, before the Maidstone post went out, a 20*l*. Maidstone bank note, payable on demand; he kept it till the morning of the 7th, and then sent it by the carrier, who reached Maidstone at nine in the morning of the 7th: the post of the 6th reached Maidstone an hour sooner; the bank did not open that day: Gibbs C. J. held there was laches in plaintiff, and he directed a nonsuit. [See also Elting v. Brinkerhoof, 2 Hall, 459.]

(37) Camidge v. Allenby, 6 Bar. & Cr. 373. 10th December at 3 p.

And it will make no difference, though the person, by whom the bill or note was to be paid, had stopped payment, and would not have paid it if presented. (37)

Unless it could also be shown that the person giving the bill or note to A., knew that the person to pay it had stopped payment, so as to make it a fraud in him to give it to A. (37)

The party giving such a bill or note is entitled to have it promptly put into circulation or presented, that he may have the better chance of an early notice that the party who ought to pay has stopped; and then he may judge for himself whether he will sue such party; and if he be in time to call upon the person from whom he took the bill or note, he may call upon him accordingly. (37)

A bill or note payable on demand, is payable immediately upon presentment; and unless put into circulation, must be presented within a reasonable time after the receipt. (*r*)

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m. defendant gave plaintiff four 5*l.* notes, payable to bearer on demand, of the bank at Huddersfield of Dobson and Co. They were given for oats plaintiff sold that day to defendant. At 11 o'clock that day Dobson and Co. stopped payment, but neither plaintiff nor defendant knew it. The notes were given to plaintiff at York, 40 miles from Huddersfield; and plaintiff lived at Laythorn, 52 miles from Huddersfield. Plaintiff did not circulate the notes, nor present them for payment; but, on 17th December, he required defendant to take them back. Defendant refused, and plaintiff sued him for the price of the oats. A special case was reserved; and on argument, the three judges were clear that defendant had made the notes his own, and the debt was to be considered as discharged; had he given defendant prompt notice, defendant might have resorted to the parties from whom he had the notes, and at all events he might have sued Dobson and Co. upon the notes. Postea to defendant.

[(*r*) Redfield and Beers made two notes dated Jan. 31st, 1814, payable on demand to Nickerson. Nickerson endorsed the note for the accommodation of R. and B. R. and B. informed Nickerson that the money would not be demanded immediately. A demand was made on R. and B. Sept. 23d, 1814, and immediate notice of non-payment given to Nickerson. The holder and the other parties to the note all resided in Boston. In an action against Nickerson as endorser, Parker C. J. charged the jury, that a demand on this note must be made in a reasonable time; and that what was reasonable time was a question of law arising from the facts which appeared; and that the delay of eight months was unreasonable. Verdict for defendant. Parker C. J. delivered the opinion of the Court. "Was the demand in this case made in a reasonable time? The jury have said no, and they were perfectly justified in returning that answer." Field v. Nickerson, 13 Mass. R. 131.

In an action in New York against the endorser of a note payable on

It has (38) not been expressly decided whether what shall be considered as a reasonable time is to be taken as a question of fact for the determination of the jury, or as a question of law for the determination of the Court. In Darbishire v. Parker (39), Lawrence J. intimated very decidedly that it

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demand, where the holder of the note, the maker, and the endorser, all resided in the city of New York, and no demand was made on the maker until more than five months after the date of the note, it was held that this was an unreasonable delay, and that the endorser was discharged. Sice v. Cunningham, 1 Cowen, 397.

In an action against the endorser of a note payable on demand, dated September 4th, 1819, where no demand was made until after May 6th, 1820, Story J. said, "Unless there be circumstances in the case which account for the delay, a neglect to demand payment of such a note for more than seven months is an unreasonable delay, and discharges the endorser." Martin v. Winslow, 2 Mason, 241.

It seems that where a note payable on demand is endorsed, and the endorser requests the endorsee "not to call on the maker at present," this will not justify the endorsee in not calling on the maker till after six months from the time of the endorsement. Lord v. Chadbourne, 8 Greenl. 198.

A delay of the holder of a note payable on demand, to present it, from Nov. 10 to Jan. 26, was considered too long, in a case where the holder, in the presence of the endorser had asked the maker, on the day of the date of the note, when it would be paid, and was answered in a day or two. Louden v. Howard, 2 Hayw. N. C. R. 332.

Vreeland v. Hyde, 2 Hall, 429. Suit against the endorser of a note. Vreeland, the plaintiff, who was an old man, residing out of the State of New York, lent money to Hyde and Bauta, and took from them as security for its repayment their note, dated June 18, 1827, endorsed by the defendant, in which they promised to pay the defendant the sum borrowed, "with interest from date, without default or defalcation." Interest on the note was paid at the end of a year, and was endorsed on it. On March 23, 1829, a demand was made on the makers, and notice given to the endorsers the next day. A verdict having been taken for the plaintiff, subject to the opinion of the Court, it was held that the defendant was not discharged by the delay in making the demand. The Court said that "the rule requiring a presentment within a *reasonable* was intended for, and is applicable to negotiable instruments, *made for commercial purposes only*. It was not intended for cases of suretyship, or notes of a like description, and the present one is entirely excluded from the rule by the circumstances attending it. Judgment for the plaintiff.

(38) Vide antè, Muilman v. D'Eguino, p. 214, n. (33). Tindal v. Brown, post, note (82). Appleton v. Sweetapple, post, p. 226, n. (46). Hankey v. Trotman, post, p. 227, n. (48); and Hilton v. Shepherd, Hopes v. Alder, and Darbishire v. Parker, infrà, n. (39).

(39) Whether it is the province of the judge, or of the jury, to decide upon the reasonableness of notice, has never been expressly determined. In Tindal v. Brown, post, note (82), Lord Mansfield considered

it as a question partly of fact and partly of law: Ashhurst and Buller Js. as a question of law. In the two cases of Hilton v. Shepherd, and Hopes v. Alder, 6 East's Rep. pp. 14. 16. note, Lord Kenyon considered it as a question for the jury, under all the circumstances of accident, necessity and the like. But the judgment of Lawrence J. in Darbishire v. Parker, shows it was his decided opinion that it was an inference of law, to be drawn by the Court from the facts, which (as in all other cases) were to be found by the jury.

Darbishire and another v. Parker, 6 East's Rep. 3. The plaintiffs received at Manchester notice of the dishonor of a bill, between eight and nine o'clock in the morning of the 12th of August. The post from Manchester to Liverpool, where the drawer resided, set off between twelve and one o'clock at noon. They, however, sent no notice by the post of that, or of the next day, but sent it by a private hand on the 13th, by which it was delivered about nine o'clock at night, two hours later than it would have arrived had it been sent by the post. Lord Ellenborough left it to the jury, whether reasonable notice had been given, and they found for the plaintiffs. A new trial was moved for, on the ground of a misdirection, and a rule nisi granted. The Court, without entering into the general question, held that the case deserved reconsideration; inasmuch as the plaintiffs appeared, at all events, to have been guilty of laches, whether the notice should have been sent by the post of the 12th or by that of the next day,—having failed in doing either. Rule absolute. In this case, Lawrence J. on the general question, whether reasonable notice be a question of law or of fact, said, "It must be recollected, that the facts stated in the report of Tindal v. Brown were afterwards found in a special verdict, in which the jury did not find whether the notice were reasonable or not; on which special verdict this Court gave judgment for the plaintiff, and that judgment was unanimously confirmed in the Exchequer chamber. But if reasonable notice were a question of fact, and not of law, I am at a loss to know how those judgments are to be sustained; for, the jury did not find the fact of reasonable notice, but left that as a question of law to be inferred from all the circumstances. But if it were a question of fact, there ought to have been a venire de novo in that case." In Ball v. Wardell, Willes, 204. 206. where a custom was pleaded for the inhabitants of a town to walk and ride over a certain close of the plaintiff's at all *seasonable* times, what was to be deemed a *seasonable* time was considered to be a question of law, arising out of all the circumstances; of which Lord C. J. Willes says, "the Court were the proper judges, as in the case of *reasonable time*, reasonable fines," &c. "For," he adds, "what is contrary to reason cannot be consonant to law, which is founded on reason; and therefore the reasonableness in these and the like cases depends on the law, and is to be decided by the judges." And in the same case he says, "issues may be joined on things which are partly matters of fact, and partly matters of law; and then, when the evidence is given at the trial, the judge must direct the jury how the law is; and if they find contrary to such direction, it is a sufficient reason for a new trial."

See also Anderson v. Royal Exchange Assurance Company, 7 East's Rep. 43, in which Lord Ellenborough, in speaking of the time within which the assured may abandon the property insured, says, "an abandonment must be made within a reasonable time; and I rather conceive that it is the province of the judge to direct the jury as to what is a reasonable time under the circumstances." See also Bateman v. Joseph, post. See also Co. Lit. 56. *b*. "Reasonable time shall be ad-

was a question of law for the judges, and yet in many instances since it has been treated as a question of fact for the jury. (40)

Upon a bill or note payable on demand or at sight, and given for cash by a person who makes the profit by the money on such bills or notes a source of his livelihood, it is difficult to say what length of time such person shall be entitled to consider unreasonable; but, upon such bills or notes given by way of payment or paid into a banker's, any time beyond what

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judged by the discretion of the justices before whom the cause dependeth: and so it is of reasonable fines, customs, and services, upon the true state of the case depending before them; for reasonableness in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices. For nothing that is contrary to reason is consonant to law." See also Appleton v. Sweetapple, post, 226.

[In a case in New York, Kent C. J., in delivering the opinion of the Court, says, "The question of reasonable notice is a compound of law and fact, to be submitted to a jury." Taylor v. Bryden, 8 Johns. R. 136.

So in Louisiana, it is held that what is reasonable notice to an endorser, is a mixed question of law and fact. Chandler v. Sterling, 9 Martin, 565.

In the case of Hussey v. Freeman, Sewall J. says, "The endorser is entitled to seasonable notice: and what is seasonable notice is a question of law, to be decided by the Court, as soon as the facts necessary to the decision are ascertained." 10 Mass. R. 84. S. P. Van Hoesen v. Van Alstyne, 3 Wend. 75; United States v. Barker, 1 Paine, 156. See also Mohawk Bank v. Broderick, 10 Wend. 304; Ferris v. Saxton, 1 South. R. 1; Philips v. M'Curdy, 1 Har. & John. 187.

See also Field v. Nickerson, antè, p. 221; and Haddock v. Murray, 1 N. Hamp. R. 140; Whitwell v. Johnson, 17 Mass. R. 453; Bank of Columbia v. Lawrence, 1 Pet. Sup. C. R. 578.

In another case in New York, Spencer J. said, "What is reasonable notice, is a mixed question of law and fact; but when the facts are ascertained, it becomes purely a question of law." Bryden v. Bryden, 11 Johns. R. 187.

But in Pennsylvania, what is reasonable notice appears to have been considered a question of fact, on which the jury were to decide. Robertson v. Vogle, 1 Dall. R. 252; Steinmitz v. Currie, 1 Dall. R. 234 and 269; Bank of North America v. Petit, 4 Dall. R. 127; Bank of North America v. M'Knight, 2 Dall. R. 158; Warder v. Bell, 1 Yeates, 531; Gurly v. Gettysburg Bank, 7 Serg. & Raw. 324.

And in Alabama, whether there have been due presentment and reasonable notice are questions of fact for the jury. Braham v. Ragland, 1 Minor, 85. But see Eldridge v. Rodgers, 1 Minor, 392, in which time for presentment appears to be considered a question of law.]

(40) See Fry v. Hill, antè, p. 213, n. (29), and Goupy v. Harden, antè, p. 215. Shute v. Robins, antè, p. 214. Hoar v. Da Costa, post, p. 225, and Manwaring v. Harrison, post, p. 226.

the common course of business warrants (41), is unreasonable.

Upon a bill or note of this kind given by way of payment, the course of business seemed formerly to allow the party to keep it, if payable in the place where it was given, until the (42) morning of the next day of business after its receipt;

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(41) See Turner v. Mead, infrà, note (42).

(42) Ward v. Evans, Ld. Raym. 928. A banker's note was paid to the plaintiff's servant at noon, and presented for payment the next morning, at which time the banker stopped payment. On a case reserved, the Court held it was presented in time: and judgment was given for the plaintiff.

Moore v. Warren, Str. 415. The defendant gave the plaintiff a banker's note at two o'clock in the afternoon, and he tendered it for payment the next morning at nine: the banker stopped a quarter of an hour before; and Pratt C. J. told the jury the loss should fall on the defendant, there being no laches in the plaintiff, who had demanded the money as soon as was usual in the course of dealing, and that keeping the note till next morning, could not be construed giving a new credit to the banker; and the jury found for the plaintiff. In Holmes v. Barry, Str. 415. the circumstances were the same; and King C. J. of the Common Pleas, gave a similar direction, and the jury found accordingly.

Fletcher v. Sandys, Str. 1248. A banker's note was paid to the plaintiff after dinner, and he sent it for payment the next morning, but the banker had stopped payment; and Lee C. J. ruled that there was no laches in the plaintiff, and that in all these cases there must be a reasonable time allowed, consistent with the nature of circulating paper.

Turner and others v. Mead, Str. 416. The defendants paid the Sword Blade Company (the plaintiffs) two banker's notes, at three o'clock in the afternoon; and the next morning their servant left them at the banker's, in order to call for the money in the evening, it then being the custom with the plaintiffs and the bank to send out their notes in the morning and to call for the money in the afternoon. The plaintiffs' servant called for the money between four and five in the afternoon, and the banker had just stopped payment; and because the plaintiffs had done nothing more than was usual in leaving the notes in the morning without taking the money, Pratt C. J. directed the jury to find for them, which they did. Sed vide Hayward v. Bank of England, antè, p. 218.

Hoar v. Da Costa, Str. 910. The defendant paid the plaintiff a banker's note at twelve: he put it into the bank at one, and at ten the next morning the runner from the bank carried it with other notes, and left them, as was then usual, to call again for the money: he called at eleven, and was told the banker's servant was gone to the bank: he called again at two, when the banker said he was going to stop, and refused payment; but he paid small notes till four o'clock. The plaintiff gave notice to the defendant the next morning: the question was, whether this note was payment to the plaintiff. It was insisted for the defendant, that if the note had been tendered by itself it would have

and till the next post, if payable elsewhere; but (43) not longer.

Thus, where a note of this kind, payable in London, was given there in the morning, a presentment the next morning was held (44) sufficiently early; a presentment at two the next afternoon too (45) late.

In (46) a later modern case, where a similar note was given in London at one, and not presented till the next morning, three juries held the delay unreasonable, but it was against the opinion of the Court.

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been paid; and for the plaintiff, that if there had been no demand there would have been no laches, it being within a day after the receipt that the banker stopped. Raymond C. J. said there was no standing rule, and left it to the jury, who found for the plaintiff.

(43) Manwaring v. Harrison, Str. 508. On Saturday the 17th of September, about two o'clock, Harrison gave Manwaring a banker's note, dated the 5th of September, and payable to Harrison or order on demand; Manwaring paid it away the same afternoon to J. S., who presented it for payment on the Tuesday morning as soon as the shop was open: but the banker stopped payment at that time. Manwaring paid the money to J. S., and brought this action to recover it from Harrison. Pratt C. J. left it to the jury, whether there had been any neglect; and observed, that as Harrison had kept it eleven days, he probably would not have demanded payment sooner than J. S. did. The jury wished to leave it to the Court whether there had been a reasonable time; but the Chief Justice told them they were the judges of that; upon which they found for the defendant, and gave it as their opinion, that a person who did not demand a banker's note in two days, took the credit on himself.

East India Company v. Chitty, Str. 1175. At half past eleven in the morning of the 18th of January, the defendant paid the East India Company's cashier a banker's note, and they did not send it for payment till the next day at two, at which time the banker stopped payment. The question was, who should bear the loss? and upon examining the merchants, it was held, that the Company had made it their own by not sending it out the afternoon they received it, or at furthest the next morning; and the jury found accordingly for the defendant.

(44) Ward v. Evans, Moore v. Warren, Holmes v. Barry, Fletcher v. Sandys, antè, p. 225, note (42).

(45) East India Company v. Chitty, suprà.

(46) Appleton v. Sweetapple, B. R. Mich. 23 Geo. 3. A bill payable in London on demand was given to the plaintiff in London at one o'clock in the afternoon, and he did not present it till the next morning; the question was, whether he presented it in time? Lord Mansfield left the point to the jury, who found for the defendant; but the Court granted a new trial, because the question was a matter of law upon which the judge should have decided; the jury found again for the defendant, but against the judge's direction; a second new trial was granted, and the jury again found for the defendant; and then the Court refused to interfere.

But in a more recent case, where such a note payable in London was given in the country, it was held that the person receiving it was not bound to send it to London till the following day. (47)

And that the person receiving it in London was not bound to present it till the next day. (47)

A bill or note of this kind, given by way of payment to a banker, must (48) be presented by him as soon as if it had been paid into his hands by a customer.

And it has been held, that a bill or note of this kind, if payable at the place where the banker lives, must be presented the next time the banker's clerk goes (48) his rounds.

But, if a London banker receive a check by the general

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(47) Williams v. Smith, (1819.) 2 Barn. & Ald. 496. At ten o'clock on Friday morning, defendant paid plaintiff, at Wantage, (eighteen miles from Newbury,) 450*l.* in Newbury bank notes, payable at Newbury or in London: plaintiff sent them to the Wantage bank the same day, to remit to London, but they declined on account of the risk, and halves of them were sent to London by Saturday's coach, and the other halves by Sunday's post. They were presented for payment on the Tuesday, but no Newbury notes were paid in London after the Monday, nor at Newbury after the Saturday. Newbury was a two-days' post from Wantage, and the post from London left Wantage at half after five in the evening. On case, it was urged for defendant, that plaintiff should have sent the notes to London by the Friday's post, or if not, that they should have been presented for payment the day they arrived in London, in either of which cases they would have been paid; but the Court held, that plaintiff had till the day after they were received, i. e. till Saturday, to send them to London, and the banker there had till the day after he received them, i. e. till Tuesday, to present them: and postea to plaintiff.

(48) Hankey v. Trotman, Blackst. 1. The plaintiff was a banker, and had a bill on the defendant, for which the defendant paid him a draft upon another banker at twelve at noon, and the plaintiff got it marked for acceptance that night; before the next morning the banker on whom it was drawn stopped. The question was, whether the plaintiff or defendant should bear the loss? The jury found a verdict for the defendant, and upon a rule to show cause why there should not be a new trial, and cause shown, the Court (Wright J. dubitante) held that it was a question of fact, whether the plaintiff had sufficient time for receiving the money, of which the jury were the proper judges; and the verdict stood.

But see the cases of Rickford v. Ridge, and Robson v. Bennett, in the two following notes. In the last-mentioned case, Mansfield C. J. said, that Hankey v. Trotman had been overruled by Appleton v. Sweetapple. See 2 Taunt. 394.

post, he is not bound to present it for payment (49) until the following day.

And where a person in London received a check upon a London banker between one and two o'clock, and lodged it soon after four with his banker, and the latter presented it between five and six, and got it marked as a good check, and the next day at noon presented it for payment at the clearing-house; the Court held that there had been no unreasonable delay, either by the (50) holder in not presenting it for payment on the first day, which he might have done, or by his (50) banker in presenting it at the clearing-house only, on the following day at noon: it being proved to be the usage among such bankers, not to pay checks presented by one banker to another after four o'clock, but only to mark them if good, and to pay them the next day at the clearing-house.

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(49) Rickford and others v. Ridge, 2 Campb. N. P. C. 537. The plaintiffs, bankers at Aylesbury, gave the defendant cash for a check upon Smith and Co., bankers in London; and in an action to recover this money, it appeared that they took the check on the 13th of June, but, instead of sending it to London by the post of that day, which they might have done, they sent it by a morning coach on the 14th; and their bankers, to whom it was directed, received it between three and four o'clock on the same day, and presented it at Smith's house at noon on the 15th, when payment was refused. It was proved that bankers to the west of St. Paul's, where the plaintiffs' bankers resided, sent out checks and bills for payment only once in the day, and that generally before the arrival of the post; and therefore such as arrived by the post on one day generally remained with them until the following morning; so that had this check arrived by the post on the 14th, it would not have been presented until the 15th. The question therefore was, whether such practice was reasonable. It was admitted that a different practice prevailed to the east of St. Paul's. Lord Ellenborough said, he could not hear of any arbitrary distinction between one part of the city and another: in towns where posts arrived at different hours, it would be impossible, or at least unreasonable, to require that bankers should present bills and checks on the same day on which they were received: the practice here proved, that checks received in the course of one day should be presented on the following day, appeared to him to be subservient to general convenience, and consistent with the law of merchants, which merely required checks to be presented with reasonable diligence. Verdict for the plaintiffs.

(50) Robson v. Bennett, 2 Taunt. 388. On the 11th of September, between one and two o'clock, the defendants gave the plaintiffs a check upon Bloxam and Co., their bankers, in payment for goods. The plaintiffs lodged the check with Messrs. Harrisons, their bankers, a few minutes after four; and they presented it between five and six to Bloxam and Co., who marked it as good. It was proved to be the

[In order to charge the drawer or endorser of a check on a bank, it is in season to present it the day after that on which he passes it to the holder, where it is passed to the holder in the place where the bank is kept. (*o*)

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usage among London bankers, not to pay any check presented by or on behalf of another banker after four o'clock, but merely to mark it if good, and pay it the next day at the clearing-house. On the 12th at noon, Harrisons' clerk took this check to the clearing-house; but no person attended for Bloxam and Co., who stopped payment at nine on that morning, and the check was therefore treated as dishonored. The plaintiffs, in going with the check to Harrisons', passed Bloxam's house. On a case stating these facts, the Court held, that there had been no laches in the plaintiffs in not presenting the check to Bloxam and Co. on the 11th for payment; or in his bankers, in not presenting it at the banking-house, but merely at the clearing-house; and therefore gave judgment for the plaintiffs.

See also Reynolds v. Chettle, 2 Campb. N. P. C. 596.

[(*o*) Merchants' Bank v. Spicer, 6 Wend. 443; S. P. Boddington v. Schlenkner; Shrieve v. Duckham, 1 Litt. 195.

A check on a bank is in form and reality a bill of exchange; and a demand of payment at the bank must be made in order to charge the drawer. Cruger v. Armstrong, 3 Johns. Cas. 5. See also Lilley v. Miller, 2 Nott & M'Cord, 257, note; Brown v. Lusk, 4 Yerger, 210.

But though it is a general rule that a check on a bank must be presented at the bank within a reasonable time; yet where a check is presented at the bank a long time after the date, and payment is refused for want of funds of the drawer, and not on account of the insolvency of the bank, the drawer is still liable to the holder.

A check drawn by Warren on a bank in New York, 28th March, 1800, payable to bearer, was presented at the bank 20th October, 1800, for payment, which was refused, for want of sufficient funds of Warren, he having in the mean time drawn large sums from the bank. The Court held that he was liable for the amount of the check to the holder. Kent J. "It was the act of the defendant himself which defeated the payment of the check, by drawing out the money, which, in good faith, was to be considered as appropriated for the payment of the check. Although checks are now considered substantially the same as inland bills, I know no case which goes the length of exonerating the drawer, where the responsibility of the bank has remained good, and where he was himself the cause of the non-payment by withdrawing the money." Conroy v. Warren, 9 Johns. Cas. 259.

The same point is decided in Murray v. Judah, 6 Cowen, 484. In this case, Sutherland J. says, "As between the holder of a check, and an endorser or third person, payment must be demanded within a reasonable time. But as between the holder and the maker or drawer a demand at any time before suit brought is sufficient, unless it appear that the drawee has failed, or the drawer has sustained injury by the delay." See also Elting v. Brinkerhoof, 2 Hall, 459.

Why should not the same principle apply to the drawer of a common bill of exchange?

In an action against the drawer of a check, if the evidence shows that he has paid part of the check after it became due, it will not be

Where it is passed to the holder in another place, in order to charge an endorser, the holder must have it presented without delay. (*p*)

A custom among bankers that checks payable at a London banker's house, must be presented on the day on which they are due, long enough before four o'clock to allow time to present them at the clearing-house, does not bind the holder of a check who is not a banker. (*q*)

A note payable "on demand at sight," is the same as one payable at sight, and must be presented for payment. (*r*)

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necessary to prove a presentment of the check to the drawee. Levy v. Peters, 9 Serg. & R. 125.

An order drawn by a debtor in favor of his creditor must be presented to the drawee within a reasonable time, otherwise the drawer is discharged.

Jones gave Brower an order on Smith, dated December 9th, 1804; and Smith, at the time it was drawn, agreed with Brower to pay the money in about ten days; the order was not presented then, and Smith would have paid the money had the order been presented within two or three weeks from the date; the order was afterwards presented to Smith several times during the winter and also in March, 1805, when Smith had become embarrassed and unable to pay his debts. The Court held that, independently of the neglect to present at the time Smith agreed to pay it, and independently of the neglect to give notice, Jones was discharged by the negligence of Brower, whereby the money was wholly lost. Brower v. Jones, 3 Johns. R. 230.]

[(*p*) The Mohawk Bank v. Broderick, 10 Wend. 304. The plaintiffs at Schenectady, on January 14th, received a check on the Mechanics and Farmers' Bank in Albany, payable to and endorsed by the defendants. The plaintiffs forwarded the check to Albany on February 3d, and it was presented, and payment refused on February 6th in consequence of want of funds of the drawer. There is a daily mail between Schenectady and Albany, and the distance between the places is 16 miles. It was held that the defendants were discharged from their liability as endorsers by the delay of presentment. Savage C. J. in giving the opinion of the Court, says, "in Cornell v. Lovett, 1 Hall, 68, Mr. Justice Oakley says, the rule appears to be settled that no laches can be imputed to the holder, if the check is presented at any time during the day after that on which it was given. The true rule undoubtedly is, that a check, to charge an endorser, must be presented with all the despatch and diligence which is consistent with the transaction of other commercial concerns."

In the same case, a check when post dated, is considered to be not like a bill of exchange payable on a particular day, but payable on demand, *on* or *after* the day on which it purports to bear date.]

[(*q*) Boddington v. Schlenckner, 1 Nev. & Man. 540.]

[(*r*) Dixon v. Nuttall, 1 Cromp. Mees. & Ros. 307. S. C. 6 Car. & P. 418.]

A bill or note must be presented for payment on the very day on which it becomes due. (*s*)

A presentment for payment on any day before the last day of grace, will be inoperative to charge an endorser. (*t*)]

If a man take a bill on the eve of its becoming due, and it be payable at a distant place, he must not keep it by him so as to prevent its being presented for payment on the day it becomes due. (51)

And if he take it so near the time of its becoming due, that it will be impossible to present it on the day it becomes due, he must lose no time in forwarding it, or putting it into circulation, so that it may be presented without delay. (51)

[A bill payable in London was by mistake sent from Birmingham, where the holder resided, to Liverpool, to be presented for payment. On the discovery of the mistake the bill was sent immediately to London, where it did not arrive until two days after it became due, though it would have arrived in season in the usual course of the post, but for the oversight or

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[(*s*) Johnson v. Haight, 13 Johns. R. 470; Brown v. Lusk, 4 Yerger, 210.

But the strict rules as to presentment and notice have not been enforced in all our States.

In a case in New Hampshire, where the holder and maker resided about fifteen miles apart, and in a thinly settled country, a presentment eight days after the note fell due, was held to be sufficient to charge the endorser. Haddock v. Murray, 1 New Hamp. R. 140.

In a case in Pennsylvania in 1792, where notice of non-payment of a note was not given to an endorser until four or five days after it became due, M'Kean C. J. observed that before the Revolution it was not usual to give notice to an endorser, or even to call upon the maker as soon as a note became due; and that to have done so would have been considered harsh and unreasonable. Bank of N. America v. M'Knight, 2 Dall. R. 188. See also 2 Dall. 233, and Gurly v. Gettysburgh Bank, 7 Serg. & Raw. 324.]

[(*t*) Leavitt v. Simes, 3 N. H. R. 14.

(51) Anderton v. Beck, 16 East, 248. 26th December plaintiff received in Yorkshire a bill payable in London, 28th; he kept it till the 29th, and then sent it to the Lincoln bank, who forwarded it to London without delay, and it was received in London and presented for payment 2d January; plaintiff had no correspondent in London; the bill was dishonored, and in an action for goods sold, the question was, whether this bill was payment? Bayley J. thought it was, and verdict for defendant; and on motion to enter verdict for plaintiff, the Court held, that as plaintiff submitted to take this bill, he was bound to use due diligence in presenting it, and that he had been guilty of laches in keeping it from the 26th to the 29th; he might have sent it off the 27th or 28th. Rule refused.

negligence of the clerks of the post office in Liverpool. The bill was presented in London on the day of its arrival there. It was held that these circumstances were no excuse for not presenting the bill on the day when it fell due. (*u*)]

If a bill be payable at either of two places, the person taking it has the option at which to present it; and it cannot be imputed as laches in him that he presented it at the most distant, and that if he had presented it at the other it would have been paid. (52)

[But in a case in Massachusetts where the maker of a note resided at a distance from the endorsee, the Court held that a reasonable time should be allowed after the note became due, to transmit it, on the ground that the endorsee had a right to wait for payment at his own residence, before he was obliged to follow the maker to his house to make the demand. In that case the note fell due on the fourth of June, the holder residing at Boston, and the maker and endorser at Wiscasset, about two hundred miles from Boston, and the Court appeared to think that a demand on the ninth or tenth of June at Wiscasset would have been seasonable, but the case turned upon another point. Freeman v. Boynton, 7 Mass. R. 483.

In a later case in Massachusetts, Parker Ch. J. still appeared to think that the maker's residing at a distance from the holder was an excuse for not presenting the note on the very day it fell due. The note in suit became due on Saturday, Nov. 12. He says, in giving the opinion of the Court, "As, however, the holder might wait for payment to be made through the day, and the promiser lived twenty miles distant, a demand on Monday the 14th, might in this case have been seasonable." The case, however, did not turn on this point. Barker v. Parker, 6 Pick. 80.

It is impossible to reconcile what is said in the cases of Freeman v. Boynton, and Barker v. Parker to the received law of bills and notes.]

[(*u*) Schofield v. Bayard, 3 Wend. 488. According to the doctrine of this case the holder of a bill is responsible for the negligence of the officers of the post office. In this case the real cause of the non-presentment of the bill, was the carelessness of the post office clerks. Ought the holder of the bill to suffer in consequence of their neglect? It is well settled that where a notice of non-payment is put into the post office, the holder of a bill or note is not to suffer, even if it is never received by the party to the notice. The principle on which this decision rests, is that the holder having put the notice in the post office, has done all which he could be reasonably expected to do. Why should not the same principle be applied to forwarding a bill or note by mail, which is the most frequent and usually the most convenient mode of sending these papers from place to place?]

(52) Beeching v. Gower, Holt, 313. Plaintiff took of defendant at Tunbridge, on 5th March, a 10*l.* Kentish bank note, payable on demand at Maidstone, or at Messrs. Ramsbottom's, London. Plaintiff sent the note to London the same day, and it was presented at Ramsbottom's on the 6th, but they ceased paying that day; the Kentish bank paid all

A (53) bill or (54) note importing to be payable within a limited time after a certain event, or on a given future day (54), or (55) at sight, is not in fact payable until (56) two days after the expiration of that time, nor, unless the third be a day of public rest, until (56) three.

These extra days are called days of grace.

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the 6th, so that had it been sent to Maidstone it would have been paid: defendant insisted that plaintiff ought to have sent it to Maidstone, which was nearer, and where plaintiff had a clerk; Gibbs C. J. was clear that, as the note was payable at either place, plaintiff had his option at which to present it; and verdict for plaintiff.

(53) Coleman v. Sayer, 1 Barnard, B. R. 303. In an action upon an inland bill payable six days after sight, one question was, whether three days' grace are allowed where a bill is payable at certain days after sight, as well as where it is payable upon sight? and Raymond C. J. said they were allowable in one case as well as in the other. Another question was, whether they were allowable upon inland as well as upon foreign bills? and the common serjeant and foreman of the jury said it was the constant practice in the city to allow them in both cases; upon which, Raymond C. J. said he would not alter it; but the plaintiff was nonsuited on another point.

(54) Brown v. Harraden, 4 Term Rep. 148. In an action on a note dated the 13th of September, 1789, and payable the 2d of November, the declaration stated a presentment and refusal on the 2d of November. The defendant pleaded a tender on the 5th, and the plaintiff replied a bill of Middlesex sued out the 4th: rejoinder, that defendant was not liable to pay the note at the time the bill of Middlesex was sued out, and surrejoinder that he was. Demurrer and joinder. The question therefore was, whether three days' grace were to be allowed on promissory notes? and after argument the Court was unanimous that they were. The same point was taken for granted in Smith v. Kendall, antè, p. 29. note (73). See Dexlaux v. Hood, Bull. Ni. Pr. 274. Ward v. Honeywood, Dougl. 62. May v. Cooper, Fort. 376.

(55) See Coleman v. Sayer, antè, note (53), and in Janson v. Thomas, B. R. Trin. 24 G. 3. Buller J. mentioned a case before Willes C. J. in London, in which a jury of merchants was of opinion that the usual days of grace were to be allowed on bills payable at sight. But see Poth. pl. 12. 172. 198.

(56) Tassell v. Lewis, Lord Raym. 743. "In case of foreign bills of exchange, the custom is, that three days are allowed for the payment of them; but if it happens that the last of the three days is a Sunday, or great holiday, as Christmas-day, &c., upon which no money used to be paid, there the party ought to demand the money upon the second day, otherwise it will be at his own peril. Merchants in evidence swore this to be the custom of merchants, and it was approved by Holt C. J. See also 2 Bl. Com. 469. Mar. 2d ed. 25.

[The rules as to days of grace in the United States are generally the same as those stated in the text. Farnum v. Fowle, 12 Mass R. 89; Jackson v. Richards, 2 Cain R. 344; Johnson v. Haight, 13 Johns. R. 470; Bussard v. Levering, 6 Wheat. R. 102; Norton v. Lewis, 2 Conn.

[No action on a bill or note can be brought against any party to it until the last day of grace. (*v*)

No days of grace are allowed on a note payable on demand, but a suit may be brought against the maker on the very day it is given, without any previous demand. (*w*)

A check on a bank payable at a future day is a bill of exchange, and entitled to grace. (*x*)]

Different (57) countries vary in the number of days allowed by way of grace; and in two cases, some years ago, it was proved (58), that at Hamburg the holder of a bill is not bound

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R. 198; Widgery v. Munroe, 6 Mass. R. 449; Shepard v. Hall, 1 Conn. R. 329; Furnan v. Harman, 2 M'Cord, 436. Lovell v. Wartenburgh, 1 Nott & M'Cord, 83; Piatt v. Eads, 1 Ind. R. 81; Crenshaw v. M'Kiernan, 1 Minor, 295; Broddy v. Searcy, Peck, 182.

A note dated August 25th, payable in four years, falls due August 28th. Ripley v. Greenleaf, 2 Verm. R. 129.

The day of Commencement at Harvard College, in Massachusetts, is not a day of public rest. But it is the usage of the banks in Boston to consider it as a holiday, and when it is the last day of grace of a bill or note, to make a demand and give notice on the preceding day. It was held that this usage of one of the banks in Boston was binding on an endorser of a note discounted for him at the bank, who was acquainted with the usage; and that whether the note was made payable at the bank or not, was immaterial. City Bank v. Cutter, 3 Pick. 414.

The Supreme Court of Massachusetts formerly held that a promissory note was not entitled to grace, unless expressly made payable with grace. Jones v. Fales, 4 Mass. R. 251. But merchants were never satisfied with this doctrine. And Mr. Dane says, "when the Court gave the opinion in Jones v. Fales, as to grace, it was new. Gentlemen, old in practice, understood that we had adopted the English law as to this, as we had the other parts of that law, in regard to negotiable contracts." 1 Dan. Dig. 413. A statute was passed in Massachusetts, in 1824, which allows grace on all bills payable at sight or at a future day certain, within the State, and on all notes, orders, and drafts payable at a future day certain, within the State, in which there is not an express stipulation to the contrary, in the same manner it is allowed by the custom of merchants on foreign bills, payable at a certain period from date or sight. St. 1824, c. 130.]

[(*v*) Hogan v. Cuyler, 8 Cowen, 203.]

[(*w*) Cammer v. Harrison, 2 M'Cord, 246.]

[(*x*) Brown v. Lusk, 4 Yerger, 210.]

(57) Beawes, s. 260, 1st ed. p. 449. The number allowed by the Hamburg ordinance, art. 16, is twelve.

(58) Goldsmith and another v. Shee, C. P. cor. Lord Eldon, 20th of Dec. 1799. A bill for 500*l.* drawn on Katter at Hamburg, at three usances, was dated the 25th of June, 1799; it was presented for payment on the 4th of October, which was a post day. In an action by

to present it until the eleventh day after the time limited for its payment, where the eleventh is a post day; that if the eleventh be not a post day, he must present it the next preceding post day; but that (59) if the drawee reside not at Hamburg, but at Lubeck or Bremen, or other place near Hamburg, and in daily intercourse with it, the holder need not present it until the eleventh day, although the eleventh be not a post day.

[In the District of Columbia four days of grace are allowed by the banks. (*y*)]

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the endorsees against the payee, the defence was, that the presentment was improper; but it was proved in evidence as the settled usage at Hamburg, that, although it is usual to pay bills on the day they become due, the holder may, if he please, keep them a certain number of days, called respite days; and that the number of respite days is eleven where the eleventh is a post day; but where the eleventh is not a post day, the respite days extend to the preceding post day only, the holder being obliged at his peril to protest, and send off the protest by the eleventh day. Verdict for the plaintiffs.

But this is not consistent with the Hamburg ordinance, art. 17: in which it is stated that the holders may postpone the protest until the twelfth day, if it be not a Sunday or holiday.

(59). Goldsmith and another v. Bland and another, C. P. cor. Lord Eldon, 1st of March, 1800. A bill for 998*l.* 9*s.* 9*d.*, drawn on Treviramus of Bremen, but payable in Hamburg at three months, was dated the 15th of June, 1799; it was not presented or protested until the 26th of September, which was not a post day: another bill for 261*l.* 7*s.* 2*d.* addressed to Voeg, in Lubeck, payable in Hamburg at three months, was dated the 26th of June, 1799; it was not presented or protested until 7th of October, which was not a post day. In an action on these bills against the defendants as endorsers, it was proved that it was optional in the holder of a bill at Hamburg, whether he would present and protest it on the post day before the eleventh day after the day limited for its payment, the eleventh not being a post day, or whether he would keep it until the 11th: and one witness proved, that where the drawee lived at Lubeck or Bremen, it was the constant usage to keep the bill until the eleventh, whether it was a post day or not, there being posts from Lubeck and Bremen to Hamburg every day. Verdict for the plaintiffs for 1633*l.* See the preceding note.

[(*y*) It is the custom of the banks in the District of Columbia to demand payment of notes on the *fourth* day after the time limited for payment, instead of the third; and it was held, that a demand on the fourth day upon the maker of a note held by one of these banks was sufficient to charge an endorser who was acquainted with the custom. Renner v. Bank of Columbia, 9 Wheat. R. 581.

In the case of a similar custom of the bank of Ohio, it was held that in order to charge the endorser of a note payable at the bank, it was not necessary to prove that he was acquainted with the custom, for that by becoming party to a note, payable at the bank, he agreed to be

In this country, [England] upon the last day of grace, and within a reasonable time before the expiration of that day, a bill or note must be presented for payment.

But, if the holder make a second presentment on that day, the drawer or maker is (60) entitled to insist on paying it when such presentment is made, without paying the fees of noting or protesting, although such presentment be made after the banking hours, and for the purpose of noting and protesting.

A presentment on the second day of grace, where the third is not a day of public rest, is a (61) nullity.

Where the third is a day of public rest, the second is the proper day.

The days of public rest in England are, Sundays, Good Friday, Christmas-day, and every day appointed by proclamation for a solemn fast or day of thanksgiving. (62)

[In the United States the fourth of July is a day of public rest, and therefore when the third day of grace on a bill or note falls on that day, it must be presented on the third. (*z*)

In Louisiana, where a bill or note is made payable at a

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governed by the usage of the bank. Mills v. Bank of the United States, 11 Wheat. 431.

In a subsequent case, where a bill drawn at Alexandria upon a person residing in Washington, was left in one of the Washington banks for collection, a presentment for payment on the fourth day of grace, was held to be sufficient. Marshall C. J. in giving the opinion of the Court, said, "This bill being drawn on a person residing in Washington, and being protested for nonpayment in the same place, is, according to the law-merchant, to be governed by the usage of Washington." Bank of Washington v. Triplett, 1 Pet. Sup. C. R. 25.]

(60) Leftley v. Mills, post, note (88).

(61) Wiffen v. Roberts, Espinasse, 261. A bill was dated 1st November, 1798, and payable three months after date: in an action against the drawer, it appeared that the only presentment for payment was on the 3d of February, which was only the second day of grace, and the day following was not a day of public rest; and Lord Kenyon held, that the non-payment by the acceptor the day before the bill became regularly due, was not such a default in him as could authorize the holder to have recourse to the drawer, and the plaintiff was nonsuited.

(62) 39 & 40 Geo. 3. c. 42. 7 & 8 Geo. 4. c. 15. s. 1 & 2.

[(*z*) In a case in New York, where the third day of grace fell on the fourth of July, the jury found by a special verdict that it was the general practice and usage of the city of New York ever since 1784, where the last day of grace fell on the fourth of July to demand payment and give notice on the third. The Court held the demand sufficient. Lewis v. Burr, 2 Cain. Er. 195. S. P. Cuyler v. Stevens, 4 Wend. 566.]

certain day "*fixed*," it is payable on that day, and no days of grace are allowed. (*a*)

As a note is not payable until the last day of grace, a person to whom it is passed by the payee for a good consideration, on the first or second day of grace, is not liable to any set-off or other defence which the maker might set up against the payee. (*b*)]

Upon a bill or note payable within a limited time after sight, the time must be computed from its (63) presentment for acceptance; and upon a bill or note payable within a limited time after the date, where it has no date, from (64) the day it issued.

[(*a*) Durnford v. Patterson, 7 Martin, 460. Derbigny J. in giving the opinion of the Court, says, that the usage of making notes payable at a day *fixed* is peculiar to Louisiana, and shows that it is supported by the Spanish law.]

[(*b*) Savings Bank of New Haven v. Bates, 8 Conn. R. 505. The Eagle Bank discounted the defendant's note, dated on September 2d, payable in sixty days. On September 16th, the Eagle Bank stopped payment. On November 2, being the 61st day from the date of the note, the defendant presented notes of the Bank to the amount of his note, and demanded payment of them, and also tendered them in payment of his note. The Bank refused to pay the notes, or to receive them in payment of his note, alleging that the note was not due. The defendant then gave notice, that when his note became due he should again present the Bank notes for the same purpose. On the next day being the second day of grace on the note, the Eagle Bank endorsed it to the plaintiffs, bona fide, as security for a debt due from the Bank to them, they having notice of the facts. It was held, that the defendant had no right to pay his note, or claim a set-off, when he made the tender, that the subsequent transfer to the plaintiffs was legal, and that the plaintiffs, notwithstanding their knowledge of these facts, had all the rights of bona fide endorsers for a valuable consideration, and were entitled to recover in the action.]

(63) Beawes, s. 252. 1st ed. p. 447; but Mar. 2d ed. p. 19. says, "from the day of acceptance, or protest for non-acceptance." By the Hamburg ordinance, art. 26. "If a bill of exchange, at or after sight, should not be accepted immediately on its being presented, but it should be done afterwards, such acceptance is to be considered as made on the first day of *presentment*." Pothier, pl. 13. says, "from the day of presentment *and* acceptance." See Campbell v. French, 6 Term Rep. 200.

[Where a bill payable at so many days' sight, is presented one day, and accepted the next, the number of days must be computed from the day on which it is accepted, not from the day on which it was presented; the acceptance cannot be considered as relating back to the presentment. A bill payable in so many days after sight means so many days after legal sight; and a general acceptance is an agreement to pay in so many after the acceptance, for that is the sight which the drawee admits and refers to. Mitchell v. Degrand, 1 Mason, 176.]

(64) Armitt v. Breame, Lord Raym. 1076. An award which directed

The calculation of the time depends upon the different modes of computing time.

All places, with which we are in the habit of negotiating bills, compute their time, as we do, (except that Russia adheres to the old style) by years reckoned in a series from the birth of our Saviour, and divided each into twelve months, and 365 (or in every fourth year 366) days.

Upon a bill drawn at a place using one style, and payable at a place using the other, if the time be to be reckoned from the date, it shall be computed according to the style of the place at which it was drawn; otherwise according to (65) the style of the place where it is; and in the former case the date (66) must be reduced or carried forward to the style of the place where the bill is payable, and the time reckoned from thence.

Thus, on a bill dated the 1st of May, old style, and payable here two months after date, the time must be computed from the corresponding day of May, new style, viz. May 13th; and on a bill dated the 1st of May, new style, and payable at St. Petersburgh two months after date, from the corresponding day of April, old style, viz. April 19th.

Where the time after the expiration of which a bill or note imports to be payable is limited by months, without stating whether they are to be calendar or lunar months, it is to be computed by (67) calendar, not lunar months.

Thus, on a bill or note payable one month after date, and dated the 1st of January, the (68) month will not expire till the 1st of February, and the bill or note will not become due (allowing for the days of grace) until the 4th.

Where the time is computed by days, the day on which the event happens is to be (69) excluded.

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the removal of some scaffolds within fifty-eight days from the date of the award, had no date; and an objection being taken upon this ground, the Court said that the time was to be computed from the delivery. Giles v. Bourne, post.

(65) Vide Mar. 2d ed. p. 25. Beawes, § 251. 1st ed. p. 447.

(66) Mar. 2d ed. p. 22.

(67) Mar. 2d ed. p. 19.

(68) Vide Mar. 2d ed. p. 24. Beawes, § 253. 1st ed. p. 447.

(69) Bellasis v. Hester, Lord Raym. 280. Lutw. 1591. Upon a bill payable ten days after sight, Treby C. J. was of opinion, that the day on

Thus, on a bill or note payable ten days after date, dated the 1st of January, the time does not expire until the 11th.

Instead of an express limitation by years, months, or days, we continually find the time on bills drawn or payable at Amsterdam, Rotterdam, Hamburg, Altona, Paris or any place in France, Cadiz, Madrid, Bilboa, Leghorn, Genoa, or Venice, limited by *the usance*, that is, the usage between those places and this country; because, in the infancy of bills, all bills between this country and any of those places respectively were usually made payable after the same interval.

An usance between this kingdom and Amsterdam, Rotterdam, Hamburg, Altona, or Paris or any other place in France, is one calendar month from the date of the bill; an usance between us and Cadiz, Madrid, or Bilboa, two; an usance between us and Leghorn, Genoa, or Venice, three.

A double usance is double the accustomed time; an half usance, half.

Where it is necessary to divide a month upon a half usance, which is the case where the usance is either one month or three, the division (70), notwithstanding the difference in the length of months, contains fifteen days.

[Any unreasonable delay in paying a bill or note on presentment, amounts to a refusal to pay. (*c*)]

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which the bill was seen by the drawee was not to be reckoned one of the ten, because then a bill payable one day after sight would be payable the day it was seen; but Powell and Neville Js. held the contrary, and judgment was given according to their opinion. However, in May v. Cooper, Fort. 376, the Court seemed to consider a note payable ten days after date, and dated the 21st July, as payable the 31st (not allowing, however, any days of grace); and in Coleman v. Sayer, 1 Barnard. B. R. 303, in an action upon a bill payable six days after sight, one question was, whether the day of sight was to be reckoned one of the six? Raymond C. J. said it was not; and the modern practice is conformable to his opinion.

(70) Mar. 2d ed. p. 23.

[(*c*) Where bank notes were sent to a bank, to obtain payment in specie, and great delay was occasioned in counting small pieces of money, it was held to be a refusal to pay. Gilbert v. Nantucket Bank, 2 Am. Law Journal, 107.

A person presented $1000 in bank notes for payment at a bank, and the teller being then occupied in paying $1000 to another person, in counting which he consumed the whole of the banking hours of that day, amounting to four hours, paid no part of the amount of the bank

The bankruptcy or known insolvency of the drawee or maker is no (71) excuse for a neglect to make a presentment, or to give notice ; (*d*)

Nor is a general ceasing to pay. (72) (*d*)

[Nor the maker's being on the eve of insolvency. (*e*)

And it makes no difference whether the drawee or maker was insolvent, and known to be so at the time of drawing the bill or note, or became so subsequently. (*d*)

The rule is the same, even if the drawer or endorser of the

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notes so presented, on that day. It was held that this delay amounted to a refusal to pay. Hubbard v. Bank of Chenago, 8 Cowen, 88.]

(71) In Russel v. Langstaffe, Dougl. 497. 515., Lee said, arguendo, that it had frequently been ruled by Lord Mansfield at Guildhall, that it is not an excuse for not making a demand on a note or bill, or for not giving notice of non-payment, that the drawer or acceptor has become a bankrupt, as many means may remain of obtaining payment by the assistance of friends, or otherwise ; and Lord Mansfield, who was in court, did not deny the assertion : this dictum was also referred to, arguendo, in Bickerdike v. Bollman, 1 Term Rep. 408.

Esdaile & al. v. Sowerby & al. 11 East. Rep. 114. In an action by the endorsees of a bill drawn by Cheetham on Hill in favor of the defendants, and by them endorsed to the plaintiffs, a verdict was found for the plaintiffs, and a case reserved. The bill, which was payable in London, became due on Saturday the 20th of February, when it was presented for payment, and dishonored. By mistake, notice of non-payment was not given to the defendants, who resided at Liverpool, until the 27th of February, whereas it ought to have been given on the 24th, and they refused payment on the ground of this omission. Before the bill became due, the drawer had stopped payment and become bankrupt, and the acceptor was insolvent. The drawer had himself apprised the defendants of his situation at the time of his stopping payment, and that this bill would not be paid : they knew that the acceptor had no funds but such as the drawer furnished him with : and on the 25th of February they admitted to the plaintiff's agent that they knew of the insolvency of the drawer and acceptor. It was contended that notice of the dishonor was unnecessary ; but the Court was clear that the insolvency of the drawer and acceptor, and the knowledge of it, did not dispense with the necessity of giving notice of the dishonor of the bill to the defendants. Postea to the defendants. See also Smith v. Beckett, and Brown v. Massey, post.

(72) See Howe v. Bowes, antè, p. 203.

[(*d*) Crossen v. Hutchinson, 9 Mass. R. 205 : Garland v. Salem Bank, 9 Mass. R. 408 ; Jackson v. Richards, 2 Cain. R. 343 ; Barton v. Baker, 1 Serg. & Raw. 334 ; Sanford v. Dillaway, 10 Mass. R. 52 ; Farnum v. Fowle, 12 Mass. R. 89 ; Buck v. Cotton, 2 Conn. R. 126 ; Edwards v. Thayer, 2 Bay, 217, Groton v. Dalheim, 6 Greenl. 466 ; Courie v. Shackleford, 2 Nott & M'Cord, 283 ; Shaw v. Reed, 12 Pick. 132.

But a contrary doctrine has been held in Tennessee. Overton, 260.]

[(*e*) Walton v. Watson, 13 Martin, 347.]

bill or note become so merely for the accommodation of the maker or acceptor, and know him to be insolvent at the time the instrument is made. (*e*)

Where a note is payable at a particular place, it must be presented there, in order to charge the endorsers, although the maker has left the State. (*f*)

But where an endorser of a note receives sufficient security for the purpose of indemnifying himself against his endorsement, he is liable to the holder of the note, though there has been no demand or notice. (*g*)

[(*f*) Shaw v. Reed, 12 Pick. 132.]

[(*g*) Farnham was sued as endorser of a note made by Barker. Before the note became due Barker became insolvent, and stopped payment, and assigned all his property to Farnham, to secure him against this and other endorsements. But the whole property assigned was not sufficient to secure him against the other notes, exclusive of the one in suit. No sufficient demand was made upon the maker. Farnham after notice to him offered to pay the note in foreign bills, but the plaintiffs refused to receive them. It was held that Farnham was liable as endorser. Parsons C. J. delivered the opinion of the Court. "The defendant had no right to insist upon a demand upon the maker. He must be considered as having waived the condition of his liability, and as having engaged with the maker, on receiving all his property, to take up his notes. And the nature of this engagement cannot be varied by an eventual deficiency in the property; because he has received all there was. This intent of the parties is further supported by the offer of the defendant to take up this note if the plaintiffs would receive foreign bank notes in payment." Bond v. Farnham, 5 Mass. R. 170.

Mechanics' Bank v. Griswold, 7 Wend. 165, is a very similar case, where the endorser was held liable, except that in this case the assigned property was sufficient to indemnify the endorser against all liabilities.

See also Barker v. Parker, 6 Pick. 80.

In an action against Small as endorser of a note made by Allen, no sufficient demand or notice being proved, it appeared that Small held a mortgage of Allen's real estate, as collateral and sufficient security for the amount of the note. Mellen C. J. delivered the opinion of the Court. "These facts present a stronger case in favor of the plaintiff than those in the case of Bond v. Farnham, (supra). There the property pledged was not a *sufficient* indemnity to the endorser, but it was all that the maker had. Here it is proved to be sufficient. If the endorser has protected himself from eventual loss by his own act in taking security from the maker, such conduct must be considered as a waiver of the legal right to require proof of demand and notice." Mead v. Small, 2 Greenleaf, 207.

So in a case in Pennsylvania, where the maker of a note had made a general assignment of all his property, to an endorser, to indemnify him for his advances and endorsements, it was held that the holder

Especially where the endorser has promised to pay. (*h*)

And the endorser of a note who has received an assignment of the maker's property, for the purpose of securing him against his endorsement, is liable without any demand or notice, although the assigned property is not sufficient to secure the endorser against his other responsibilities for the maker, exclusive of the note. (*g*)

In an action against an endorser of a note, it is no excuse for not making a presentment, that the holder, when he received the note from the endorser, was informed by him that the maker was a transient person, without any known place of abode. The holder is still bound to use due diligence to ascertain the maker's residence. (*i*)

The dissolution of the partnership of the makers of a note before it falls due, is no excuse for not making a presentment. (*k*)

The right to insist upon a demand and notice may be waived or modified by custom, or the agreement of the parties. (*l*)

Thus where it is the custom of banks to notify the maker of a note without presenting the note itself, or to notify him before the note falls due, if the maker of the note is acquainted with this custom, such a notice will be a sufficient presentment to charge the endorser. (*l*)

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was excused from proving a regular demand and notice in order to charge the endorser. Barton v. Baker, 1 Serg. and Raw. 334. See also Corney v. Da Costa, post.

But see Ireland v. Kip, 11 Johns. R. 231.

In Tennessee it is held that a partial indemnity given by the maker to an accommodation endorser, does not excuse want of demand on the maker, and notice to such endorser. Brunson v. Napier, 1 Yerger, 199.]

[(*h*) Durham v. Price, 5 Yerger, 300. The maker having put property into the hands of an endorser, to pay the note, and the endorser, knowing that no demand had been made or notice given, promised to pay the note: it was held that he was liable on his promise. Hopkins v. Liswell, 12 Mod. R. 252. was cited.]

[(*i*) Otis v. Hussey, 3 N. H. R. 346.]

[(*k*) Butler v. Denham, 2 M'Cord, 350.]

[(*l*) Fuller v. M'Donald, 8 Greenl. 215. See Renner *v.* Bank of Columbia, antè, p. 235; Hartford Bank v. Stedman, 3 Conn. R. 489; Haslett v. Urick, 1 Nott & M'Cord, 116.

It was the usage of the banks in Boston, where a note was payable with grace, to notify the maker on the first day of grace, that the note

would become due on the last day of grace, and request him to make payment, by sending a printed notice to this effect by the messenger, who did not take the note with him: and on the last day of grace to notify the endorser that the note was not then paid. In an action against an endorser, where the maker and endorser had been notified in conformity with this usage, and it was proved that the defendant was cognizant of this usage, and had in other cases conformed to it, the Court held that this evidence was proper to go to the jury, to infer from it an agreement of the defendant to waive a legal demand on the maker, and to be bound by the demand and notice in conformity with the usage of the banks. Jones v. Fales, 4 Mass. R. 245.

In Widgery v. Munroe, 6 Mass. R. 449, a similar case to the foregoing, the Court held that notice to the maker of a note in conformity with the usage of a bank, of which the endorser was cognizant, was sufficient to bind him.

The usage of the Boston banks, as it appeared from a more recent case, was to send notice to the makers of notes on the last day exclusive of the day of grace, and to send notice to the maker on the last day of grace after banking hours, if the note was not paid, and to send a notice to the endorser at the same time. Boston Bank v. Hodges, 9 Pick. 420.

Lincoln and Kennebec Bank v. Page is similar to Widgery v. Monroe. Sewall J., who delivered the opinion of the Court, said, "It is incumbent upon the holder of a note, to prove, in maintaining an action against an endorser, a demand upon the promiser, as soon as the note became due, and notice to the endorser." But, he said, that the endorser might waive or modify his right to require such demand and notice, "When this is done by an express stipulation, there can be no doubt; and where he continues to endorse notes, and to deal with a bank, where by the known usage, or by the by-laws of the bank, these privileges have been taken to be waived or modified; his dealings and contracts are to be understood and enforced with the constructive effect of such usage." Lincoln and Kennebec Bank v. Page, 9 Mass. R. 155.

See also Blanchard v. Hilliard, 11 Mass. R. 85; and Weld v. Gorham, 10 Mass. R. 366.

In a subsequent case the same court held that the endorser of a note who was not acquainted with the usage of the bank at which the note was payable, as to demand and notice, was not bound by a demand and notice in conformity to such usage. Peirce v. Butler, 14 Mass. R. 303.

But in a later case the same court held that a demand upon the maker of a note in conformity with the usage of a bank of which he was cognizant, was sufficient to charge an endorser.

Johnson was sued as endorser of a note made by E. and M. Toppan. The note being lodged in one of the Boston banks, the makers were notified according to the custom of the Boston banks, of which the makers were cognizant. But Johnson resided at Newburyport, and there was no evidence that he had any knowledge of the usage of the Boston banks. Verdict for plaintiffs, and motion for new trial. Parker C. J. delivered the opinion of the Court. "If the endorser has seasonable notice of the fact of non-payment, when the note is due, it must be immaterial to him in what form the demand upon the maker was made. If there has been such a demand as the maker was bound by, so that he had no right to refuse payment; it is not easy to see how it concerns the endorser, whether the legal forms had been com-

But the substitute for presentment must strictly conform to the custom of the bank, otherwise it will not be sufficient to charge an endorser. (*m*)

Thus where the custom of banks is to send notice to the makers of notes on the day preceding the days of grace, and on the last day of grace after banking hours, to send notices to the makers and endorsers of notes which are not paid; and a bank holding a note sends the first notice to the maker in the usual manner, and on the last day of grace, *before* the commencement of banking hours, sends notice to the maker by mail immediately, and before banking hours notifies the endorser, it is held that the endorser is not chargeable. (*m*)

Where it is the practice of a bank to send a notice to the makers of notes, residing out of the town, instead of presenting the notes, a notice sent in this way to the maker of a note is held in South Carolina not to be a sufficient presentment to charge the endorser. (*n*)

An agreement by an endorser to waive a demand and notice, may be proved by parol evidence. (*o*)

Such a waiver need not be proved by showing a positive agreement, but may be proved by evidence which satisfies the mind that such was the understanding of the parties. (*o*)

A waiver by an endorser of a bill or note of all right to no-

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plied with, or waived by the promiser." Judgment on the verdict. Whitwell v. Johnson, 17 Mass. R. 449. See also State Bank v. Hurd, antè, p. 208.

Where it was the customary practice at a bank in which a note was discounted, to give notice to endorsers of demand and non-payment on the day after the expiration of the days of grace, held, that notice so given was sufficient where the practice of the bank was known to the party to be affected by the notice. Bank of Columbia v. Magruder, 6 Har. & John. 172; Raborg v. Bank of Columbia, 1 Har. & Gill, 231; Bank of Columbia v. Fitzhugh, 1 Har. & Gill, 239.]

[(*m*) Boston Bank v. Hodges, 9 Pick. 420. Parker C. J., in giving the opinion of the Court, said, "This constructive demand, which they [the banks] have acquired the privilege of making, instead of the more formal and troublesome mode which the law imposes on the rest of the community, must be made according to the rules of their own adoption, if they would avail themselves of their privilege; they must not, as in the present case, enforce their custom as to the mode of demand, and depart from it as to the time."]

[(*n*) Halls v. Howell, Harper's R. 426.]

[(*o*) Fuller v. M'Donald, 8 Greenl. 213.]

tice, does not excuse the holder from making a presentment on the drawee or maker. (*p*)

But where a person transfers a note, and at the same time guaranties its payment if not collected of the maker by due course of law, and also waives notice of demand; the demand as well as notice is waived. (*q*)

If the endorser of a note expressly waives presentment and notice, he is not discharged by a mere delay to collect the money of the maker. (*r*)

The makers of a note being insolvent, the holder, on the day it fell due, asked the endorser, who knew of their insolvency, and had taken security from one of them, which, however, turned out to be of no value, if it would not be best to call on the makers. The endorser replied, it would be of no use. It was held, that this was an assent on the part of the endorser that a presentment need not be made. (*s*)

Where one person was a member of two partnerships, one of which signed, and the other of which endorsed a note, it was held that a presentment for payment was still necessary in order to charge the endorsers. (*t*)

The death of the maker of a note, and the endorser becoming his administrator before the note becomes due, afford no excuse for not presenting the note, and giving notice of its dishonor to the endorser. (*u*)

[(*p*) Berkshire Bank v. Jones, 6 Mass. R. 524; Backus v. Shipherd, 11 Wendell, 629.]

[(*q*) Backus v. Shipherd, 11 Wendell, 629.]

[(*r*) Johnston v. Seavey, 4 Yerger, 182.

A note payable on the day after it was drawn, was four months afterwards endorsed by the payee as follows, "I assign the within note to S. M., waiving demand and notice." The maker continued solvent for fifteen months from the time of the assignment, and then failed. No suit was, during this time, commenced against him by the holders, who then sued the endorser. It was held that he was liable; and the Court said "he stood on the foot of an assignor fixed with notice."]

[(*s*) Barker v. Parker, 6 Pick. 80.]

[(*t*) Dwight v. Scovil, 2 Conn. R. 654. Swift C. J. said, "It is true one of the defendants must, in legal consideration, have known that the note was not paid; but he equally well knew, that the note, when it became due, had not been presented to the makers, and payment demanded; he knew the fact that exonerated the defendants from all liability on their endorsement; and it would be strange logic to say that this knowledge rendered the defendants liable."]

[(*u*) Magruder v. Union Bank of Georgetown, 3 Pet. S. C. R. 87; Juniata Bank v. Hale, 16 S. & R. 157.]

A heavy rain occurring on the day a note falls due, is no excuse for the holder's not presenting it, though he resides at a number of miles distance from the place where it is payable. But if a violent tempest should break up the roads or render them impassable, perhaps it might excuse a delay in making a presentment. (*v*)

No presentment of a check on a bank is necessary where, after the check is drawn and before the payee is bound to present it, an injunction from chancery, under an act of New York to prevent fraudulent bankruptcies of incorporated companies, is served on the bank, which prevents it from making any payments; and in such case the holder of the check who receives it of the drawer, may recover on his original debt of the drawer. (*w*)]

Sect. 2.—Notice (73) must be given of a failure in the attempt to procure an acceptance, though the application for such acceptance might have been unnecessary; otherwise the person guilty of the neglect may lose his remedy upon the bill.

But such neglect will be no bar to a subsequent endorsee, if he took the bill before it became due, and gave value for it, being ignorant that acceptance had been refused (74), and the

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[(*v*) Barker v. Parker, 6 Pick. 80.]

[(*w*) Lovett v. Cornwell, 6 Wend. 369. The ground taken upon this case by Ch. J. Jones, of the City Court, and concurred in by the Supreme Court of New York, was that a presentment could not be of any possible benefit to the drawer, not merely because the bank was insolvent, but because it was by the operation of the injunction legally disabled and prohibited from paying the check.]

(73) Vide Blesard v. Hirst, and Goodall v. Dolley, post.

(74) O'Keefe v. Dunn, 6 Taunt. 305. (1815. Trin.) 19th June, a bill at one month after date was drawn by defendants, payable to Sinclair, or order: Sinclair presented it for acceptance, and acceptance was refused, but no notice was given to defendants: Sinclair endorsed the bill to plaintiff for a valuable consideration, before the month from the date expired, but plaintiff had no notice of the prior refusal to accept: 13th July, plaintiff presented the bill for acceptance, which was refused. Action inde: defendants pleaded the presentment for acceptance by Sinclair, the refusal and want of notice thereof; plaintiff traversed the presentment and refusal, and after verdict thereon for defendants, rule nisi to enter judgment for plaintiff non obstante veredicto: and after cause shown, and time to consider, Gibbs C. J., Heath

bill do not import upon the face of it to have been noted or protested for non-acceptance.

So if the drawee offer a partial or conditional acceptance, or an acceptance at an extended period, or if any other person offer an absolute one, though the holder may be willing to acquiesce in such acceptance, he must (75) give notice.

In that case, however, if he wish to have the power of availing himself of it, he should mention in his notice the acceptance offered; for a notice generally of non-acceptance shows (76) he did not acquiesce in such offer.

A neglect to give notice, where there is a conditional acceptance, is done away by the completion of those conditions before the bill becomes payable; and a neglect, where there is an acceptance as to part and a refusal as to the residue only, discharges the persons entitled to notice as to the residue only.

[Immediate notice must be given of the refusal to accept a bill, payable after sight. Notice of the refusal to accept, and the refusal to pay, given after the day of payment has passed, will not be sufficient. (*x*)

And in the case of a foreign bill, it must be *protested* for non-acceptance, or the drawer and endorsers will be discharged. (*y*)

If the holder of a bill on presenting it refuses to leave it for acceptance the usual time, but has it protested, though the drawee does not refuse acceptance, the holder must give im-

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and Dallas, against Chambre J., were of opinion that plaintiff was entitled to judgment; that the bill did not necessarily require presentment for acceptance; that defendants therefore had not, by the nature of the instrument, stipulated for such presentment; but that, on the contrary, they had, by its form, agreed that such presentment should not be necessary, and that the bill, if the holders so pleased, should be negotiable till the period for payment arrived; that an innocent endorsee therefore might be deluded, and the negotiation of such bills defeated, if his remedy were to be destroyed by a fact of which he had no notice, and as to which there was nothing to raise a suspicion. Rule absolute. And on error, the judgment was affirmed in the King's Bench. Antè, Dunn v. O'Keefe, p. 162. 141

(75) Vide Mar. 4th ed. p. 21. Beawes, s. 221. 2d ed. p. 445.

(76) Vide Sproat v. Matthews, antè, p. 178. note (50).

[(*x*) Austin v. Rodman, 1 Hawks, 194; Thompson v. Cumming, 2 Leigh, 321; Ralston v. Bullitts, 3 Bibb, 261.]

[(*y*) Thompson v. Cumming, 2 Leigh, 321.]

mediate notice to the parties to the bill, otherwise they will be discharged, notwithstanding the drawee accepts the bill the next day. (*z*)]

The notice must come from the (77) holder, or from some party entitled to call for payment or reimbursement.

It has, indeed, been held, that notice from the acceptor to the drawer that he had not been able to pay it, and that it was then in plaintiff's hands, was sufficient; but that might, perhaps, have been on the ground that the acceptor wrote for the plaintiff, and as his agent. (78)

[(z) A bill drawn on Stevenson, was presented for acceptance September 30th at his counting-room. Stevenson being out, his clerk proposed that the bill should be left, and said that Stevenson would accept it on his return. The bill was left; but Mitchell, the holder, had it immediately protested for non-acceptance. The next day Stevenson told a person sent by Mitchell, that he would accept the bill, and send it to Mitchell in the course of the day. No notice of the protest for non-acceptance was sent to the drawer, until the bill was protested for non-payment. In an action against the drawer, the Court held that he was discharged. Story J. said, that the payee was not bound to consider what passed between him and Stevenson's clerk as a non-acceptance; but that he might properly have waited till the next day, a reasonable time, to ascertain the intentions of the drawee. "But he elected to consider the bill as dishonored on the 30th of September, and protested it accordingly for non-acceptance. And the question now is, whether as to all the other parties to the bill, he is not bound by that act; I am very clear that he is. When a bill is once dishonored, the holder is bound to give notice by the next practicable mail, to the parties whom he means to charge. No such notice was given in this case. But it is said that on the 1st of October, and before the mail from Boston was closed on that day, the drawee accepted the bill, and thereby notice became unnecessary. Assuming that the evidence clearly shows an acceptance, still where once a bill is dishonored, the right of the other parties to notice immediately and absolutely attaches, and no subsequent acts between the holder and drawee can vary that right." Mitchell v. Degrand, 1 Mason, 176.]

(77) Exparte Barclay, 7 Ves. 597. Barclay was endorsee and holder of two bills, drawn by Kemp upon Dearlow, and endorsed by Clay to Barclay. These bills were dishonored, of which Clay gave notice to Kemp; and on petition by Barclay to be allowed to prove these bills, under a commission of bankruptcy issued against Kemp, one question was, whether this notice from Clay, and not from Barclay the holder, was sufficient? And Lord Eldon C. J., after referring to Tindal v. Brown, held that the notice ought to have come from the holder, and dismissed the petition. See Jameson v. Swinton, post.

[See also Williams v. Matthews, 3 Cowen, 252; Chanoine v. Fowler, 3 Wend. 173; Brower v. Wooten, 2 Tayl. R. 70.]

(78) Rosher v. Kieran, 4 Campb. 87. Endorsees of bill against drawer, and the question was, whether defendant had had due notice

[But notice to the drawer, from a drawee who refuses acceptance, is not sufficient. (*a*)]

A notice from the holder or any other party will enure to the benefit of every other party who stands between the person giving the notice and the person to whom it is given. (79)

Therefore, a notice from the last endorsee to the drawer, will operate as a notice from each endorser.

It is, nevertheless, prudent in each party who receives a notice, to give immediate notice to those parties against whom he may have right to claim; for, the holder may have omitted notice to some of them, and that will be no protection (80); or there may be difficulties in proving such notice.

Though a holder, or any other party, give no notice but to the person of whom he took the bill, yet if notice be communicated without laches to the prior parties, he may avail himself of such communication, and sue any of such prior parties; it is no objection in such case that there was no notice immediately from the plaintiff to the defendant. (81)

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of the bill's dishonor? It was proved, that, on the day the bill became due, the acceptor wrote to defendant that he had not been able to pay the bill, and that it was in plaintiff's hands: Lord Ellenborough held this sufficient, and verdict for plaintiff. See Stewart v. Kennet, 2 Campb. 177.

[(*a*) See Stanton v. Blossom, post, p. 250.]

(79) Wilson v. Swabey, 1 Stark. 34. In an action by endorsee of a bill against the drawer, it appeared that notice was communicated to Lewis, an endorser, the day after the bill became due, and that Lewis gave defendant notice the next day: it was objected, that plaintiff had not given defendant notice; but Lord Ellenborough said, notice from any person who was party to the bill was sufficient, and plaintiff had a verdict. [Stafford v. Yates, 18 Johns. R. 327, is to the same effect; Abal v. Rion, 9 Martin, 465, also confirms the doctrine stated in the text. See also Butler v. Duval, 4 Yerger, 265.]

(80) Edwards v. Dick, 4 B. & A. 212. In an action by endorsee against drawer, it appeared that the acceptor made the bill payable at a particular place, and it did not appear that plaintiff had given the acceptor notice of its dishonor: but, on motion for nonsuit on that ground, the Court held it sufficient, in order to warrant a suit against defendant, that notice was given to him; he could not object that a third person had not had notice: if he were entitled to a remedy over against the acceptor, he should have given him notice. Rule refused.

[See Morgan v. Woodworth, 3 Johns. Cas. 89.]

(81) See note (79).

[A notice from a notary public to whom a bill or note has been handed for the purpose of having him present it and give notice, is sufficient; so from any person having a parol authority, or the mere possession of the bill or note. (*b*)

An agent receiving a bill or note for collection, is bound to have it duly presented, and if it be dishonored, to have it duly protested if a bill, and whether a bill or note, to send immediate notice of the dishonor to the party from which he received it, in order that he may give notice to the parties to the bill. A neglect in any of these particulars, by means of which the holder's resort to the parties on the bill, is lost, will render the agent liable to an action by the holder for the negligence. (*c*)

[See also U. S. Bank v. Goddard, 5 Mason, 366.

In Haslett v. Poultney, 1 Nott & M'Cord, 466, which was an action against the drawer of a bill, the only notice to him proved was, that an endorser who had received a notice and a copy of the protest, called the same day on the defendant, and gave him the information. This was held to be a sufficient notice: The report does not state that the endorser informed the defendant that he was looked to for payment.

Stanton v. Blossom, 14 Mass. R. 116. Putnam J. delivered the opinion of the Court. "Lord Ellenborough held that notice from any person who was a *party to the bill* was sufficient. But the drawee who refuses to accept, is not a party: and notice from him is in no degree better than notice from a stranger." "The holder himself, *or some one authorized*, must give the notice. Now the endorser who has been notified by the holder, of the dishonor of the bill, may, by reason of his liability, be considered as authorized to notify the drawer for the benefit of the holder as well as himself; both having an interest in the matter."]

[(*b*) Bank of Utica v. Smith, 18 Johns. R. 230; Hartford Bank v. Stedman, 2 Conn. R. 489; Shrieve v. Duckham, 1 Litt. 194; and see other cases cited p. 219, note (*m*). In Hartford Bank v. Barry, 17 Mass. R. 94, the Court held that the cashier of a bank, might by his endorsement on a note belonging to the bank, authorize a third person to make a demand and give notice; it being part of his official duty to see that the proper steps were taken to charge the parties to notes. But the Court appeared to entertain no doubt that any person to whom the note was sent for the purpose, would be sufficiently authorized to make a demand and give notice, without any endorsement by the cashier. See Butler v. Duvall, 4 Yerger, 265.]

[(*c*) Bank of Washington v. Triplett, 1 Pet. Sup. C. R. 25; Smedes v. Utica Bank, 20 Johns. R. 372; S. C. 3 Cowen, 662; Durnford v. Patterson, 7 Martin, 460.

See also Miranda v. City Bank of New Orleans, 6 Louis. R. 740. In this case the liability of a bank with which a bill or note is left for collection, to the holder, for negligence in presenting or notifying, is fully recognised. In an action against a bank for negligence in not notify-

But where a bank with which a note is left for collection employs a competent and faithful agent for the purpose of notifying the parties to the note, the bank is not answerable for his default or neglect. And it seems that a notary being a public officer, and usually employed to protest notes and notify endorsers, is a competent agent. But if the bank gives the note to an agent who is not competent, it will be liable for his default. (*d*)

A bank receiving a note for collection, is not discharged from the duty of making a presentment, in consequence of the removal of the maker out of the city in which the bank is situated, before the note becomes due. (*e*)

Where a debtor transferred a note to his creditor as collateral security for the debt, the amount of the note, when paid, to be applied towards paying the debt, and the note, if not paid to be returned to the debtor; it was held that the debtor might maintain an action on the case, in his own name, for breach of duty against a bank with which the note had been left by the creditor for collection, and which had neglected to give notice of non-payment to previous parties, whereby the debt was lost; although the creditor who left the note with the bank did not mention the debtor from whom he received it. (*f*)

It is not necessary for the holder of a note to sue the endorsers, before suing a bank for negligence in not taking the proper steps to charge them. (*g*)

In a suit against an agent for negligence in not taking the proper steps to charge the parties to a bill or note left for col-

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ing the endorser of a note left with it for collection, the bank can only be exonerated by proving that notice was in fact duly given. It is no defence for the bank that the holder did not give it notice of a suit brought by him against the endorser, which failed on the ground of want of notice. The endorser's attending a meeting of the creditors of the maker for the purpose of being secured against his endorsement, is no evidence that he waived due presentment and notice.]

[(*d*) Smedes v. Utica Bank, 20 Johns. R. 372; Utica Bank v. Smedes, S. C. 3 Cowen, 662.]

[(*e*) Louisiana State Insurance Company v. Louisiana State Bank, 15 Martin, 610.]

[(*f*) M'Kinster v. Bank of Utica, 9 Wend. 46; Bank of Utica v. M'Kinster, S. C. 11 Wend. 473.]

[(*g*) Canonge v. Louisiana State Bank, 15 Martin, 344.]

lection, the agent cannot dispute the title of the party who left it with him. (*d*)]

Though no prescribed form be necessary for notice of the dishonor of a bill or note, it ought to import that the person to whom it is given is considered liable, and that payment from him is expected. (82)

And the notice ought to import that the bill or note has been dishonored: a mere demand of payment and threat of law proceedings in case of non-payment is not sufficient. (83)

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(82) Tindal v. Brown, 1 Term Rep. 167. 186. A note which became due on the 5th of October, was presented at ten in the morning, and the maker not being at home, word was left for him where it lay; the holder sent again on the 6th, when the maker promised to take it up within the banking hours, which were from nine to four; on the 7th, the holder sent again to the maker, and the note not being paid, gave notice to the defendant, who was an endorser, but the defendant said he had made it his own; the maker had told defendant on the 6th, that he could not pay it, and desired the defendant would: all the parties lived at Bristol. The jury found for the plaintiff; but upon a rule to show cause why there should not be a new trial, and cause shown, the Court granted a new trial. Lord Mansfield said, "What is reasonable notice is a question partly of fact, and partly of law: it may depend in some measure on facts; such as the distance at which the parties live, the course of the post, &c.: but wherever a rule can be laid down with respect to this reasonableness, *that* should be decided by the Court, and adhered to for the sake of certainty." Per Willes J. "New credit was given to the maker, and I cannot consider notice from the maker equal to notice from the holder." Ashhurst J. "The reasonableness ought to be settled as a question of law; the next day, at the most, is as long as is necessary in a case like this; if the parties live at a small distance, this is a sufficient time; if at a greater, they should write by the next post. Notice means something more than knowledge, because it is competent to the holder to give credit to the maker: it is not enough to say that the maker does not intend to pay, but that the holder does not intend to give credit; the party ought to know whether the holder intends to give credit to the maker, or to resort to him." Per Buller J. "*When* the post goes out, is a matter of fact; when that is established, it is a matter of law, what notice is reasonable; as to giving time, the holder does it at his peril, and that is enough to decide the case; the purpose of giving notice is to let the party know that he is looked to for payment, that he may have his remedy over by an early application; if it shows that the holder has given time, it discharges the party: it ought to purport that the holder looks to him for payment, and a notice from another person cannot be sufficient; it must come from the holder." Upon the second trial there was contradictory evidence whether the notice from the maker was on the sixth or the seventh, and the jury found again for the plaintiff; but the Court said, it was a verdict against law, and granted another new trial.

(83) Hartley v. Case, 4 Barn. & Cr. 339. In an action by endorsee

Especially if such demand be made on the day the bill or note becomes due. (83)

[A letter from the attorney of the holder of a bill, sent to an endorser the day after its dishonor, informing him that the bill bearing his endorsement has been put into the attorney's hands, with directions to take legal measures for the recovery thereof, unless immediately paid, is not a sufficient notice, because it does not state that the bill has been dishonored. (*h*)

A mistake in stating any fact in a notice will not vitiate it, if the person to whom it is sent is not misled by the mistake. (*i*)

It is a question of fact for the jury to decide whether he has been misled by the mistake. (*i*)

A notice stating that a draft endorsed by the defendant described in the notice, was protested for non-payment "last evening," when in fact it had been dishonored and protested on the evening on which the notice bore date, was held not to vitiate the notice if the defendant was not misled by it. (*i*)

So a notice to an endorser in which there is an error in stating either the date of the note, (*k*) the day when it became due,

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against the drawer of a bill drawn on Case the elder, the only notice to defendant was a letter from plaintiff to defendant the day the bill became due. Its import was, "I am desired to apply to you for payment of 150*l.* due to myself on a draft drawn by Mr. Case on Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place:" Abbott C. J. thought this no notice of the dishonor, and nonsuited plaintiff, and on rule nisi to set aside the nonsuit the Court agreed with him. Rule discharged.

[(*h*) Solarte v. Palmer, 5 M. & P. 475; S. C. 7 Bing. 530; 5 Car. & P. 475; 1 Crom. & J. 417; 1 Tyrw. 371.]

[(*i*) Action against the endorser of a draft, which fell due August 30, 1828. The notice which had been sent to the defendant was in these words: "New York, August 30, 1828. Sir, Please to take notice that Sprague & Dana's draft on Rob't. & Geo. Barton, and accepted by them for $350, endorsed by you, was last evening protested for non-payment, and that the holders look to you for the payment thereof." The draft had in fact been dishonored and protested on August 30, 1828, the same day the notice was dated. At the trial the jury was instructed to find for the defendant, if they believed he had been misled by the notice, but otherwise for the plaintiff. A verdict having been found for the plaintiff, a motion was made to set it aside on account of misdirection of the judge; but the Supreme Court of New York denied a new trial. Ontario Bank v. Petrie, 3 Wend. 456.

See also Mills v. Bank of United States, post.]

[(*k*) In an action brought by the United States Bank against the en-

the maker's name, (*l*) or the amount of the note (*m*) is sufficient, the note being in other respects sufficiently described, so that the endorser could not be misled by it.

It is not necessary that a notice of non-payment of a bill or note should state who is the holder of it (*n*) (*o*) or at whose request the notice is sent. (*o*)

So it is sufficient in such a notice to state the fact of non-payment; it is not necessary to allege a presentment for payment at the place where the bill or note is payable. (*n*)

It is not necessary that the notice should state every fact

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dorser of a note, dated July 20th, 1829, and payable at the office of the United States Bank at Chilicothe in sixty days, it appeared that the notice of non-payment described the note correctly except in stating that it was dated September 20th, 1819, and it also appeared that there was no other note payable at the same place endorsed by the defendant, and having the same makers. It was held, that the notice was sufficient, as the defendant could not have been misled by it. Mills v. The Bank of the United States, 11 Wheat. 431.]

[(*l*) The notice to an endorser, which was sent on the last day of grace, January *sixth*, called the note "Jotham *Cushing's* note;" the name of the maker being in fact Jotham *Cushman;* and also said that the note became due January *third*. In an action against the endorser the judge (Parker) directed the jury to find for the plaintiff, if they believed that the defendant must, from the notice, have necessarily known what note was intended; which they accordingly did. And the whole Court considered the direction correct, and judgment on the verdict. Smith v. Whiting, 12 Mass. R. 6.]

[(*m*) A note was made for $1216 50, at the bottom of the note were the figures $1216 52. The notice of non-payment sent to the endorser described the note as given for the latter sum. In an action against the endorser the judge left it to the jury, whether the note produced, and the one described and intended by the notice were the same. Verdict for the plaintiff. A motion for a new trial was refused. The Court said, "The law does not prescribe any form of notice to an endorser. It is not perhaps requisite to specify the amount of the note. The notice was sufficient to put the defendant on inquiry." Reedy v. Seixas, 2 Johns. Cas. 337.

S. P. Bank of Rochester v. Gould, 9 Wend. 279.]

[(*n*) Mills v. Bank of the United States, 11 Wheat. 431. S. P. Shrieve v. Duckham, 1 Lit. 194.]

[(*o*) A notice sent to an endorser by a notary public, who had presented the note for payment, did not state who was the holder of the note, or at whose request the notice was sent. The notice was held sufficient. Parker C. J. giving the opinion of the Court, said, "No particular form is necessary; the great object of the notice is to put the party affected by it on his guard; and if he is informed of the two principal facts, that the note is dishonored, and that the holder looks to him for payment, he may easily acquire all other knowledge necessary for his safety." Shed v. Brett, 1 Pick. 401.]

in regard to the bill or note which the party notified may be interested to know, such as the absence from the State of the maker or acceptor when it was presented, (*p*) or that he has made a partial payment on it. (*q*)

It has been held that it is not necessary in such a notice to state formally that the party notified is looked to for payment. (*r*)

A notice of the dishonor of a bill sent by a notary, in whose hands it is placed for protest, &c. is sufficient, though his name at the bottom of it be printed. (*s*)]

In the case of a foreign bill, to give effect to the notice it

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[(*p*) Where the maker of a note was absent from the State at the time the note fell due, and a demand made at his dwelling house; it was held that an endorser was chargeable, although the notice to him did not state the absence of the maker. Sanger v. Stimpson, 8 Mass. R. 260.]

[(*q*) The maker of a note paid a part of the amount on the day it became due, a general notice to the endorsers not stating this part payment, was held sufficient to charge them. James v. Badger, 1 Johns. Cas. 131.]

[(*r*) Bank of the United States v. Carneal, 2 Pet. Sup. C. R. 543. Story J. giving the opinion of the Court, says, "A suggestion has been made at the bar, that a letter to the endorser, stating the demand and dishonor of the note, is not sufficient, unless the party sending it also informs the endorser that he is looked to for payment. But when such notice is sent by the holder, or by his order, it necessarily implies such a responsibility over. For what other purpose could it be sent? We know of no rule which requires a formal declaration to be made to this effect. It is sufficient if it may be reasonably inferred from the nature of the notice."

S. P. Shrieve v. Duckham, 1 Litt. 194.]

[(*s*) Bank of Cape Fear v. Seawell, 2 Hawks, 560. This was a suit against the endorser of a bill. When the bill became due it was held by the Planters' and Mechanics' Bank. The bill being presented and protested for non-payment, the following notice addressed to the defendant, to wit, "You will please to take notice, D. Ochiltree's draft on S. Mumley accepted by him for 5000 dollars 50 cents, on which note you are endorser, is placed in my hands from the Planters' and Mechanics' Bank for protest. It not being settled by the drawer, payment is expected from you immediately. John Hinkley Mitchell, Notary Public. Charleston, 15th March, 1819." was sent to the plaintiffs with the protest, &c. They sent it on the same day to the defendant. The name John Hinckley Mitchell was printed. The notice was held to be sufficient. Henderson J. said, that the law had not prescribed any particular form of notice. "All that is required is, that the party be apprized of the fact of non-payment. It may be in words, it may be in writing, it may be read from a memorandum or letter, either written or printed, signed or unsigned, bearing the name of any one or of no one; for the person giving the notice adopts it as his own."]

is (84) necessary that a minute of the non-acceptance or non-payment, and a solemn declaration on the part of the holder against any loss to be sustained thereby (which minute and declaration is called a protest), should be made out by a notary public, or (if there be no such notary in or near the place where the bill is payable) by an inhabitant in the presence of two witnesses; and in some cases a copy, or some other memorial of it, should accompany the notice.

But (85) if a man being abroad draw or endorse a bill on

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(84) Rogers v. Stephens, 2 Term Rep. 713. In an action against the drawer of a foreign bill, it appeared that the bill had been noted for non-acceptance, but there was no protest, and this was pressed as a ground for a nonsuit. Lord Kenyon admitted the objection, but upon the other circumstances thought this a case in which a protest was not necessary. See post, note (137).

Gale v. Walsh, 5 Term Rep. 239. In an action against the drawer of a foreign bill, it was reserved as a point whether it was necessary to prove a protest; and the Court thought it so clear upon the motion to enter a nonsuit, that they suggested to the plaintiff's counsel the expediency of making the rule absolute in the first instance; and upon their acquiescence it was accordingly done; they afterwards, however, wished to have it opened, upon an idea that the drawer had no effects in the hands of the drawee, but it appearing upon the report that that idea was not founded, the rule stood. And in Brough v. Parkins, Lord Raym. 993. 6 Mod. 80. Salk. 131. Holt C. J. says, "A protest on a foreign bill is part of the custom." See also Orr v. Maginnis, post.

[It was formerly held in several cases in the United States, that in an action on the protest for non-payment of a foreign bill, it was not necessary to aver in the declaration, or produce at the trial, a protest for non-acceptance. Morris v. Foreman, 1 Dall. 193, in 1787; Brown v. Barry, 3 Dall. 365, in 1797; Clark v. Russell, 3 Dall. 415, in 1799. But these decisions cannot be considered as law. See United States v. Barker's administratrix, 4 Wash. C. C. R. 468.]

(85) Cromwell v. Hynson, 2 Esp. N. P. C. 511. Endorsee against the endorser of a foreign bill. When the endorsement was made, Hynson (a master of a ship) was in Jamaica where the bill was drawn, but his residence was at Stepney. The bill was presented for acceptance, dishonored and protested; and then sent to Hynson's house for payment, with notice of non-acceptance. Hynson was not then in England, but the bill was shown to his wife, and the circumstances stated to her. It was urged, 1st, that notice should have been sent to Jamaica; 2dly, that the demand on the wife was not sufficient; and, 3dly, that a copy of the protest should have been sent with the notice; but Lord Kenyon overruled all the objections, and the plaintiff had a verdict.

Robins v. Gibson, 3 Campb. 334. 1 M. & S. 288. Endorsee of bill drawn at Buenos Ayres against drawer; before the bill became due, defendant returned to this country: the bill was dishonored, and notice thereof left at his house, but no notice given of its being protested: Lord Ellenborough held the notice sufficient; and on motion for new

this country, and afterwards come here, a notice to him here need not be accompanied by the protest, or by any memorial of it.

At least he cannot object to such notice, unless he applied for the protest on receiving the notice.

A similar protest may also be made on the (86) non-acceptance of an inland bill, if such bill be for the payment of 5*l.* or upwards within a limited time after date, and the value be expressed therein to have been received; or (87), after an acceptance written on such a bill, for its non-payment.

But not upon any other inland bills. (88)

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trial, the Court agreed with him: Lord Ellenborough said, it did not appear that defendant requested to have the protest; he had notice of the bill's dishonor, and as circumstances alter, the rule respecting notice changes; if the party is abroad he cannot know of the protest but by having it: being here, he might have inquired to ascertain that fact. Rule refused.

[Though a protest must be produced at the trial of an action against the endorser of a foreign bill, it is not necessary that the notice to him should be accompanied by the protest. Lenox v. Leverett, 10 Mass. R. 1; Wallace v. Agry, 4 Mason, 336.

In one case, Parsons C. J. says, "As to notice of the protest of a foreign bill, a copy of the protest should be given or offered to the drawer, or due diligence used to furnish him with this notice before he can be charged." Blakely v. Grant, 6 Mass. R. 386.

In a note to the case of Lenox v. Leverett, by Mr. Rand, he cites the following passage from "Thompson on Bills": "It is not now held necessary that notice should be accompanied by the bill, or by the protest, or a copy of the protest, even in the case of a foreign bill. It does *not even seem requisite to mention that there has been a protest*, when the person receiving the notice is in this country at the time of the dishonor; as he may, in that case, ascertain this fact, although it should not be notified to him. But if he is abroad *the fact of a protest having been taken ought to be mentioned* in the notice, since he otherwise cannot be supposed to be aware of it. If he afterwards require a copy of the protest, it must be sent to him." Thompson on Bills, 505, 506, 507.

(86) 3 & 4 Anne, c. 9. s. 4.

(87) 9 & 10 W. 3. c. 17. s. 1.

(88) Leftley v. Mills, 4 Term Rep. 170. An inland bill for 20*l.* 7*s.* payable fourteen days after sight, became due 24th April, 1790. A banker's clerk called with it for payment in the morning, and the acceptor not being at home, left word where it lay; after six, another of the clerks, who was a notary, noted it, and between seven and eight the first clerk went with it again. The acceptor tendered him the amount of the bill, and sixpence over; but he insisted on 2*s.* 6*d.* for the noting, and *that* sum not being paid, an action was brought against the acceptor, who pleaded the tender. Lord Kenyon thought a tender of the amount of the bill at any time of the day it was payable, was suffi-

A protest upon an inland bill is never necessary where (89) the bill is for the payment of less than 20*l.*; and on such as are for the payment of more, though the 3d & 4th Ann. c. 9. s. 5. contain words which primâ facie import that a neglect to (90) procure it would preclude the holder from recovering,

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cient; upon which the jury found a verdict for the defendant. A rule to show cause why there should not be a new trial, was afterwards granted; and upon cause shown, Lord Kenyon thought the acceptor had till the last minute of the day of grace to pay the bill, and that it could not be noted or protested till the following day. Buller J. thought they were payable any time of the last day of grace upon demand, so as such demand was made within reasonable hours; and that they might be protested on that day. Grose J. declined giving any opinion on these points; but the whole Court concurred, that the bill in question could not be noted, because it was payable within a limited time after sight, and the statute authorizes the noting of such inland bills only as are payable after date. Lord Kenyon also thought that the sixpence tendered was sufficient for the noting, and the rule was discharged.

(89) By 3 & 4 Anne, c. 9. s. 6. it is provided, that no such protest shall be necessary, either for non-acceptance or non-payment of any inland bill of exchange, unless the value be acknowledged and expressed in such bill to be received, and unless such bill be drawn for the payment of 20*l.* sterling or upwards; and that the protest hereby required for non-acceptance shall be made by such persons as are appointed by the act of 9 & 10 W. 3. c. 17. to protest inland bills of exchange for non-payment thereof.

(90) Brough v. Parkins, Tr. 2 Anne, Lord Raym. 992. 6 Mod. 80. Salk. 131. In an action against the drawer of an inland bill, it was insisted upon for error, that it did not appear by the declaration, that the bill had been protested; sed per Holt C. J. "on an inland bill no protest was necessary by the common law, and the statute does not destroy or take away the party's action where there is no protest; nor is the want of a protest any bar of the action; but the act seems only to take away from the plaintiff his interest and damages where he has not made a protest, or to give the drawers a remedy against him by way of action for their costs and damages"—and the judgment was affirmed.

Harris v. Benson, Tr. 5 G. 2. Str. 910. In an action against the drawer of an inland bill after an acceptance, Raymond C. J. ruled, that for want of a protest according to 9 & 10 W. 3. c. 17. the drawer could not be charged with interest. In Lumley v. Palmer, Ann. 77. Lord Hardwicke says, "At common law there was no way to charge the drawer of an inland bill with interest and costs after a protest; and therefore the first act was made, that after acceptance by underwriting, these bills might be protested for non-payment, and that thereon interest and charges should be paid by the drawer from the time of the protest; the statute does not say the original sum, for that is recoverable without protest, but interest and charges."

Windle v. Andrews, B. R. Trin. 59 G. 3. 2 Barn. & A. 696. In an action against the drawer of an inland bill, in which the requisites specified in 3 & 4 Anne, c. 9. s. 6. occurred, rule nisi to strike out the

against the persons entitled to notice, any special damages or costs occasioned by the non-acceptance or non-payment and interest, yet it hath not generally that effect. (91)

A protest may (92) also be made on the non-payment of coal notes, given pursuant to 3 Geo. 2. c. 26. s. 7.

A foreign bill should be noted for non-acceptance or non-

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interest from the verdict, on the ground that there had been no protest; but on cause shown, the Court held the want of a protest no ground for disallowing interest where notice of the dishonor of the bill had been duly given; that the object of 9 & 10 W. 3., and 3 & 4 Anne, c. 9. s. 4. was to give interest, damages and costs in cases in which it was supposed they were not recoverable at common law, not to deprive a plaintiff of them in any case in which the common law would give them; that the 5th section, which contained the words of deprivation, was by way of proviso only, to qualify the additional benefit that statute and the statute of William were supposed for the first time to give; that the proviso in the 8th section contained words to secure to a plaintiff all his common-law rights, and that the right to damages was a common-law right; that it was upon this principle only that the constant allowance of interest where there was no protest could be explained; that the 5th section contained words to annul parol acceptances; and in Rex v. Meggott, Hil. 7 G. 2. antè, p. 156. n. (7), Eyre C. J. of K. B. held that they had that effect; that this notion was corrected in Lumley v. Palmer, antè, p. 156. n. (7), in Mich. Term 8 G. 2. upon the principle now adopted by the Court, that the 5th section of 3 & 4 Anne, c. 9. deprived a party of no remedy he had at common law; that that case must be considered as having virtually overruled Harris v. Benson, which was in Tr. 5 G. 2., and that from that time, for any thing which appeared to the contrary, parol acceptances had been held binding, and interest had been allowed against the drawers and endorsers of all inland bills, though no instance could be shown in which any such bill had been protested.

(91) By 3 & 4 Anne, c. 9. s. 5. it is provided, that if such bill be not accepted by such under-writing, or endorsement in writing, no drawer of any such inland bill shall be liable to pay any costs, damages, or interest thereupon, unless such protest be made for the non-acceptance thereof, and within fourteen days after such protest the same be sent, or otherwise notice thereof be given, to the party from whom such bill was received, or left in writing at the place of his or her usual abode; and if such bill be accepted, and not paid before the expiration of three days after the said bill shall become due and payable, then no drawer of such bill shall be compellable to pay any costs, damages, or interest thereupon, unless a protest be made and sent, or notice thereof be given, in manner and form above mentioned. Nevertheless every drawer of such bill shall be liable to make payment of costs, damages, and interest upon such inland bill, if any one protest be made of non-acceptance or non-payment thereof, and notice thereof be sent, given, or left as aforesaid.

(92) By 3 Geo. 2. c. 26. s. 7.

payment on the (93) day on which acceptance or payment is refused; but it would seem that the protest (94) may be formally drawn up at any future period, provided that, in the event of a suit, it be drawn up before the commencement of such suit.

A protest for (95) non-acceptance of an inland bill may be made in like manner as for non-acceptance of a foreign bill; but a protest for (96) non-payment of an inland bill cannot be made until the day after such bill has become due.

[A bill drawn in one of the United States and payable in

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(93) In Buller's Nisi Prius, 272, it is said, "The use of noting is, that it should be done the very day of refusal, and the protest may be drawn any day after by the notary, and be dated of the day the noting was made."

In Leftley v. Mills, 4 Term Rep. 174, Buller J. says, "With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace." This however is not said with reference to any distinction between the time of noting the bill, and that of formally drawing up the protest, but merely as furnishing an argument to show within what time payment must be made; and the argument is equally conclusive, whether the party have the power of noting or of protesting the bill on the last day of grace. Indeed the noting is, in effect, an incipient protest.

(94) Chaters v. Bell, 4 Esp. N. P. C. 48. In an action by an endorsee against an endorser of a foreign bill, it appeared that the bill became due on the 24th of April, when payment was demanded and refused, and the bill noted for non-payment. Regular notice of the dishonor was given to the defendant, but he refused payment because there was no protest. On 14th of May, the protest was formally drawn up, and this action was afterwards brought. Lord Kenyon said, "He was of opinion, that if the bill was regularly presented and noted at the time, the protest might be made at any future period." A verdict was found for the plaintiff, but the point was reserved; and on the case coming on to be tried again on a venire facias de novo before Lord Ellenborough, his Lordship expressed his concurrence with the opinion of Lord Kenyon. See the preceding note.

Mr. Selwyn, in his Abridgment of the Law of Nisi Prius, 379, says, That a case was reserved in Chaters v. Bell, for the opinion of the Court, and that the Court, after argument, conceiving the question to be of great importance, directed it to be turned into a special verdict; but that the sum in dispute being small, and the parties unwilling to incur the expense of a special verdict, the recommendation of the Court was not attended to, and the case was not mentioned again.

(95) See 3 & 4 Anne, c. 9. s. 4.

(96) See 9 & 10 Wm. 3. c. 17. s. 1., which enables persons to make such protests "after the *expiration* of three days" after the bill has become due.

another, is a foreign bill, and must be protested for non-payment, in order to charge the drawer and endorsers. (*t*)

A protest of a promissory note, though common in many parts of the United States, is unnecessary in most of the States. (*u*)

A protest must be made where the bill is presented. (*v*)]

A notice the day the bill or note becomes due, is not too soon; for though payment may still be made within the day, non-payment on presentment is a dishonor. (97)

Especially if the acceptor says when the bill is presented, that it never will be paid. (98)

[(*t*) See note (*q*), page 21.]

[(*u*) Young v. Bryan, 6 Wheat. 146; Union Bank v. Hyde, 6 Wheat. 572; Nichols v. Webb, 8 Wheat. 326; Bank of North America v. M'Knight, 1 Yeates, 145; Payne v. Winn, 2 Bay, 374.

A protest is said to be necessary in Delaware on the non-payment of promissory notes. 4 Griff. Law Reg. 1069.

As a protest on a promissory note is unnecessary, the holder who has had a note protested cannot recover the notarial fees of an endorser. City Bank v. Cutter, 3 Pick. 414.

By the statute of Pennsylvania incorporating the Philadelphia Bank, notes discounted by the bank are placed "on the same footing with foreign bills of exchange." This does not render a protest or notice of protest on such notes necessary to charge endorsers. The object of the act was to protect the bank from loss, by preventing defences arising out of transaction between the parties to notes discounted of which the bank had no knowledge, not to lay down any indispensable form of proof. Rahm v. Philadelphia Bank, 1 Rawle, 335.

In Kentucky a protest of a note is necessary in order to charge an endorser. Read v. Bank of Kentucky, 1 Monroe, 91.

A protest made by any person in the presence of two witnesses, is good where there is no notary. And it is no objection to a protest, that the person who made it is a stockholder in a bank which holds the note, the witnesses not being interested. No costs are allowed for such a protest. S. C.]

[(*v*) Mitchell v. Baring, 1 Mood. & M. 381.]

(97) Burridge v. Manners, 3 Campb. 193. Endorsee of note against payee; the note was presented the forenoon of the day it became due, when payment was refused, and in the afternoon of that day plaintiff sent notice of its dishonor to defendant; it was urged that this notice was too soon, because the maker had the whole day to pay the note; but Lord Ellenborough thought it a sufficient notice, for as soon as the maker refused payment the note was dishonored. The plaintiff had a verdict.

[Many cases in the United States recognise the law as stated in the text. Shed v. Brett, 1 Pick. 401; Corp v. M'Comb, 1 Johns. Cas. 328; Bussard v. Levering, 6 Wheat. R. 102; and Lindenberger v. Beall, 6 Wheat. R. 104.]

(98) Ex parte Moline, 19 Ves. 216. Petition to expunge a debt by

To such of the parties as reside in the place where the presentment was made, the notice must be given at the farthest, by the expiration of the (99) day following the refusal; to those who reside elsewhere, by (100) the post of that or the next post day.

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endorsee of bill against drawer, because he had not given proper notice of the bill's dishonor. The bill was presented at 11 o'clock on the day it became due, to the acceptor, who said it never would be paid. The notice was given immediately. It was urged, that a refusal so early in the day, without proper application, was no ground for treating the bill as dishonored, and that the notice was premature. Eldon C. thought otherwise, and dismissed the petition.

(99) Tindal v. Brown, antè, p. 252. note (82). Muilman v. D'Eguino, antè, p. 214. note (33). [Canonge v. Cauchoix, 11 Martin, 452; State Bank of North Carolina v. Smith, 3 Murphy, 70; Bank of Kentucky v. Eades, 1 Litt. 277.]

Smith v. Mullet, 2 Campb. N. P. C. 208. In an action against an endorser of a bill, the only question was, whether the plaintiff had given due notice of its dishonor to one Aylett, his immediate endorser. All the parties resided in London; the bill became due and was dishonored on the 19th of May, a Saturday. The holder (who had received it from the plaintiff) gave notice to the plaintiff on the Monday, and plaintiff sent notice to Aylett on Tuesday by the twopenny post, but so late that it did not reach Aylett till Wednesday. Lord Ellenborough said, he thought there could be no rule more convenient than that, where all the parties resided in London, each should have a day to give notice; here a day had been lost. He therefore nonsuited the plaintiff.

(100) Malynes, B. 3. c. 6. s. 1. 1st ed. p. 265. Mar. 2d ed. p. 24.

[In a case where the evidence seemed to leave it doubtful, whether notice to an endorser was put into the post-office on the day on which the note fell due, or on the next, C. J. Parker, in delivering the opinion of the Court, said, "It cannot be requisite, nor do we find that it has ever been required to give notice to an endorser, living in another town, by the very next mail after the dishonor of the note, or on the same day. The next day is early enough: and if there be two mails a-day, whether the notice goes by the first or second of these mails, we think is immaterial; provided it was put into the post-office early enough to go by a mail of that day." Whitwell v. Johnson, 17 Mass. R. 449.

See also Robinson v. Ames, 20 Johns. R. 146; Townsley v. Springer, 1 Miller, 122.

Where the evidence proved notice to an endorser given *within three days* after advice received of the dishonor of a bill, where the holder and endorser resided in the same city, it was held that it did not prove a reasonable notice. Bryden v. Bryden, 11 Johns. R. 187.

In Louisiana, where the endorser of a note resided six miles from the place of presentment, notice to him three or four days after the presentment, was held to be too late. Reynolds v. Buford, 15 Martin, 35.

Notice sent from Portland to an endorser of a note at Cape Eliza-

Each party has a day for giving notice. (101)

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beth, a distance of four miles, eight days after the dishonor of the note, there being no mail between the two places, was held to be too late. Hussey v. Freeman, 10 Mass. R. 84.]

(101) Bray v. Hadwen, 5 M. & S. 68. Plaintiffs paid into their bankers at Launceston a bill on London. On Sunday morning, 17th July, about half after eight, the Launceston bankers received a letter from London announcing its dishonor; Monday evening they put into the post a letter to plaintiffs at Tavistock to give them notice; that post did not leave Launceston till twelve on Tuesday; a post left Launceston for Tavistock at twelve on Monday. Plaintiffs forwarded notice without delay to the person who endorsed the bill to them, and that person immediately forwarded notice to defendant, who was an earlier endorser. Two queries were made: one, whether the Launceston bankers were not bound to have sent notice to plaintiff by Monday's post; and, secondly, whether plaintiff should not have given notice immediately to defendant, and not have left it to the latter endorser to give that notice: Graham B. overruled both objections, and verdict for plaintiff: and on motion for new trial, the Court held it was now the settled rule that each party was entitled to an entire day for the purpose of giving notice, and that the Launceston bankers therefore were not bound to send their notice by the Monday's post, but had the whole of Monday to put in their letter; and that, as there was no delay in transmitting notice to defendant, he could not protect himself on the ground of want of notice, and rule refused.

Wright v. Shawcross, 2 Barn. & A. 501. Plaintiff received notice by a letter on a Sunday of the dishonor of a bill; he did not send notice to defendant till Tuesday's post, which set out in the evening; he might have sent it in the evening of Monday by the Monday's post. But on motion for new trial, after verdict for plaintiff, the Court held plaintiff was not bound to open the letter till Monday, nor bound to send notice till the Tuesday, and therefore rule refused.

Hawkes v. Salter, 4 Bingh. 715. A bill was dishonored at Norwich on Saturday. The post to the place where notice was to be sent left Norwich at half after nine on Monday. In the course of Monday plaintiff wrote a letter to be sent by Tuesday's post giving notice. A clerk copied it, and said it was put into the post; but stated, that he had no recollection whether it was put into the post by himself, or by another clerk. On points saved whether notice by the Tuesday's post would have been sufficient, and whether there was sufficient evidence of such notice, Best C. J. expressed himself clearly that notice by Tuesday's post would have been in time; but he thought there was no sufficient evidence that the notice had been sent. And on payment of costs, (qu. by plaintiff?) rule affirmed for new trial.

[The English rule that each party to a bill or notice has a day to give notice to a prior party, is fully recognised in the United States. But a delay of two days by a party who has received notice of the dishonor of a bill or note, to send notice to a prior party, is too long. Flack v. Green, 3 Gill & Johns. 474.

A bill was lodged in a bank at Bristol, R. I. for collection, it became due and was dishonored on October 20, 1823; on October 21, the cashier of the bank at Bristol sent the bill and protest by mail to the cashier of a bank in Providence, from which he had received it. The mail

And he is entitled to the whole day: at least, eight or nine o'clock at night is not too late. (102)

He will be entitled to the whole day, though the post by which he is to send it, goes out within the day. (101)

And though there be no post the succeeding day for the place to which he is to send. (103)

Therefore, where the notice is to be sent by the post, it will be sufficient if it be sent by the post of the following day. (101)

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arrived at Providence at 5 P. M. on the same day, but the letter was not taken out of the post office by the cashier of the Providence Bank until the next day, October 22. A mail left Providence at one o'clock on October 22, for New York, where the immediate endorser of the Providence Bank resided. The cashier of the Providence Bank put a notice to the endorser at New York into the post office on the same day, but after one o'clock. The notice therefore did not leave Providence until the morning of October 23, when the mail started at 8 o'clock. Held, that the notice to the endorser at New York was seasonable. Sutherland J. in giving the opinon of the Court said, "I do not think the cashier at Providence is chargeable with laches in not having received the bill and protest from Bristol until the morning of the 22d. It did not arrive until after five o'clock of the preceding day, when, with commercial men generally, and especially with banks, the business of the day is considered as closed." "Nor do I think the cashier at Providence was bound to forward the bill and protest by the mail, which left there at one o'clock of the day on which he received the letter. It is not reasonable to demand from him the neglect of his other official duties, to prepare his letters and notices during the usual banking hours." Sutherland J. appeared to consider it as not settled, that every party on receiving information of the dishonor of a bill might forward notice on the next day, but thought the rule was, that he must forward it by the next practicable or convenient post. Mead v. Engs, 5 Cowen, 303.

Where a party to a bill or note receives notice on Saturday, he is not obliged to give notice to a prior party till Monday. Eagle Bank v. Chapin, post.]

(102) Jameson v. Swinton, 2 Taunt. 224. In an action on a bill, by the plaintiff, who was the endorsee of Elsham, against an endorser, the defence was, that due notice of the dishonor, which took place on the 10th of July, had not been given. Elsham, the last endorser, who lived at Back-hill, Holborn, received notice on the 10th at four o'clock in the afternoon, and he gave notice on the 11th, between eight and nine o'clock at night, to the defendant, who lived at Islington. Lawrence J. held, that this was sufficient to entitle Elsham to recover from the defendant, and therefore sufficient to enable the plaintiff, who received the bill from Elsham, to recover. Verdict for the plaintiff; and on motion to set it aside, it was urged, that the notice should have been given within the hours of business, but the Court held the notice sufficient. Rule refused.

(103) Geill v. Jeremy, 1 Mood. & Malk. 61. Plaintiff received by the

Or, if there be no post the following day, the day after. (103)

Where a party receives notice on a Sunday, he is in the same situation as if it did not reach him till the Monday; he is not bound to pay it any attention till the Monday (101);

And has the whole of Monday for the purpose. (101)

So, if the day on which notice ought thus to be given be a (104) day of public rest, as Christmas day or Good Friday, or any day appointed by proclamation for a solemn fast or thanksgiving, the notice need not be given until the following day.

And it has been held that where a man is of a religion which gives to any other day of the week the sanctity of Sunday, as in the case of Jews (105), he is entitled to the same indulgence as to that day.

Where Christmas day, or such day of fast or thanksgiving shall be on a Monday, notice of the dishonor of bills or notes due or payable the Saturday preceding need not be given until the Tuesday. (106)

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post at nine A. M. Thursday, August 31, notice of the dishonor of a bill: he had to send notice to defendant in London. The post left his village at six in the evening, and it left the post town, which was only two miles off, at nine. A letter by that post would have reached London on Saturday. There was no post for London on Friday, and plaintiff did not write till Saturday: that letter did not reach London till Monday. It was insisted this was too late. Sed per Lord Tenterden, "It is of importance to have a fixed rule, and not to resort to nice questions, in each case, of a sufficiency of hours or minutes: the general rule is, the party need not write on the very day he receives the notice: if there be no post the next day, it makes no difference. The next post after the day on which he receives the notice is sufficient." Verdict for plaintiff.

(104) See Smith v. Mullet, antè, p. 262, and Haynes v. Birks, and Scott v. Lifford, post, p. 266, n. (109). See also Tassell v. Lewis, antè, p. 233, n. (56.) 39 & 40 Geo. 3. c. 42, and 7 & 8 Geo. 4. c. 15.

[Cuyler v. Stevens, 4 Wend. 566. A note fell due the third of July, notice to an endorser given on the fifth, was held to be seasonable.]

(105) Lindo v. Unsworth, 2 Campb. N. P. C. 602. Notice of the dishonor of a bill was sent to the plaintiff in London, on the 8th of October; but he being a Jew, and the 8th of October being the day of the greatest Jewish festival throughout the year, on which all Jews are prohibited from attending to secular affairs, gave no notice by the post of that day to the defendant, who lived at Lancaster, but sent it to him by the post of the 9th. Lord Ellenborough held, that the plaintiff was excused by his religion from giving notice on the 8th; and that the notice sent by the post on the 9th was sufficient. The plaintiff had a verdict.

(106) 7 & 8 Geo. 4. c. 15. s. 1, 2.

And Good Friday, Christmas day, and any day of fast or thanksgiving shall from 10th April, 1827, as far as regards bills and notes, be treated and considered as Sunday. (107)

But these provisions do not apply to Scotland. (108)

If the holder of a bill or note place it in the hands of his banker, the banker is only bound to give notice of its dishonor to his customer, in like manner as if the banker were himself the holder, and his customer were the party next entitled to notice. (109)

And the customer has the like time to communicate such notice, as if he had received it from a holder. (109)

And therefore, by thus placing a bill or note in a banker's hands, the number of persons from whom notice must pass is increased by one. (109)

Thus, notice sent by a London banker to a London customer, the day after the dishonor (109), is in time; and if the customer communicate that notice the day following, that (109) will be in time also.

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(107) 7 & 8 Geo. 4. c. 15. s. 3.

(108) 7 & 8 Geo. 4. c. 15. s. 4.

(109) Haynes v. Birks, 3 Bos. and Pull. 599. In an action against the endorser of a bill, it appeared that the bill, which had been endorsed in blank, and deposited by the plaintiff in the hands of his bankers, became due on Saturday, October 1st. On that day, at two o'clock, it was presented for payment by the bankers, and payment being refused, it was again presented between nine and ten at night by a notary, and again dishonored; the bankers sent the bill, and notice of its dishonor, to the plaintiff on the Monday, and the plaintiff gave notice to the defendant on Tuesday, about noon; the plaintiff lived at Knightsbridge, and the defendant in Tottenham-court-road. The only question was, whether this notice was sufficient. A verdict was found for the plaintiff, with liberty to defendant to move to enter a nonsuit. On motion accordingly, it was urged that the bankers were to be considered as the agents of the plaintiff, and that the defendant was entitled to the same notice as if the bill had remained in the plaintiff's hands; but the Court thought that reasonable diligence had been used, and therefore refused a rule. Lord Alvanley, however, said, that if a bill be returned to a banker, he is bound to give notice to his principal that very day, if he can do so by using ordinary diligence. (But query whether this be so?)

Scott v. Lifford, 9 East's Rep. 347. A bill due on the 4th of June, was presented on that day, by Down and Co. the plaintiff's bankers, who lived in London; the plaintiff lived in London also, and they gave him notice on the 5th. The defendant (the drawer) lived at Shadwell; and on the 6th the plaintiff sent notice to him by the twopenny post. Lord Ellenborough left it to the jury, whether the plaintiff had com-

[And where a bill or note is sent by the holder to his agent for him to obtain payment, and he gives seasonable notice to his principal of its dishonor, he does all that he is required to do; and a notice from the principal seasonably sent will be sufficient to charge any prior party to the bill or note, though a notice sent directly by the agent would have reached him sooner. (*w*)

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municated the notice in reasonable time; and they thought he had. And on a motion for a new trial, Lord Ellenborough said, he could not say that the plaintiff, omissis omnibus aliis negotiis, was bound to post off immediately with notice; it was sufficient if reasonable dilgence had been used. The Court thought the verdict right, and refused a rule.

Langdale v. Trimmer, 15 East, 291. Plaintiff paid a note into Drummonds, his bankers; it became due 25th February, was presented and dishonored; they presented it again the 26th, a little before five, and payment being again refused, they gave notice directly to plaintiff, who lived in Holborn; by the next day's post, plaintiff gave notice to defendant, who lived at Farnham. Lord Ellenborough thought both notices in time, and after verdict for plaintiff, and motion for a new trial, the Court agreed with him; they thought the banker was to be considered as a distinct holder, not as identified with his customer, and that the banker had till the next day to give notice to his customer, and the customer till the day following; and the rule was refused.

[(*w*) Noble, the defendant, master of an American ship, being at Madras and bound to Portsmouth, in New Hampshire, the place of his residence, endorsed to the plaintiffs, residents at Madras, a bill of exchange drawn in New South Wales, and payable in London. They sent it to their agents in London to obtain payment of the drawees. The bill was duly protested for non-acceptance and non-payment, and within a reasonable time returned with the protests to the plaintiffs at Madras. The plaintiffs sent seasonable notice to Noble at Portsmouth. But their agents in London might have sent him notice much earlier. The Court held that the notice was sufficient to charge Noble as endorser. Parsons C. J. giving the opinion of the Court, said, "a person appointed a factor to cause a bill to be presented, is entrusted with no other powers, and it is his duty to notify his principal. The factor may not know to which of the prior parties to the bill the principal intends to resort, and if he does, he may not know their domicils, as he has no interest in the bill, or privity with the parties." He said that the principal was not bound to give this information to his factor. "There is no difference between the cases of a bill sent to a factor to procure acceptance, and of a bill remitted to a correspondent in payment, if the bill be dishonored." Colt v. Noble, 5 Mass. R. 167; S. P. Farmers & Mech. Bank v. Turner, 2 Litt. 13; State Bank of Elizabeth v. Ayers, 2 South. R. 130; Mead v. Engs, 5 Cowen, 303; Church v. Barlow, 9 Pick. 548.

The United States Branch Bank at Portsmouth holding a note payable at the United States Branch Bank in Boston, signed by Pick-

The knowledge of the agent of the endorser's place of residence does not, in such case, make it necessary for him to send notice directly to the endorser. (*x*)

But after the holder has received notice from his agent, he must send notice immediately to the endorser himself. If he writes to his agent, requesting him to send notice to the endorser, and the agent accordingly does it, the endorser will be dis-

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ering, and endorsed by Goddard, sent it to the Branch Bank at Boston for collection. Goddard resided at Boston. The bill being dishonored, the Bank at Boston sent notice of it to the Bank at Portsmouth by mail, and the Bank at Portsmouth sent notice by mail to Goddard at Boston. There was no delay in sending these notices, but if the Bank at Boston had been the holder, he must have been notified sooner in order to charge him. The Court held that he was seasonably notified. Story J. said, "All that is required by law, is, that the holder should give notice to the endorser in a reasonable time after he has knowledge of the dishonor, and that there should be no laches in getting that knowledge, if an agent has been employed." United States Bank v. Goddard, 5 Mason, 366.

The Eagle Bank of New Haven owned a note endorsed by Chapin, and payable at the Merchants' Bank in New York. On Friday, November 1st, the note was presented by a notary at the Merchants' Bank for payment, which was refused. On the same day the notary made out a notice to Chapin, and not knowing where he resided, enclosed it in a letter directed to the cashier of the Eagle Bank at New Haven. When the letter was mailed or received was not proved, but on Monday, November 4th, the cashier sent a person from New Haven to Hartford to ascertain the place of Chapin's residence, and to put the notice into the post office there. The messenger accordingly went, and having ascertained that Chapin resided at Springfield, put the notice into the post office at Hartford a little before 9 o'clock, P. M. directed to Chapin at Springfield, the mail not being then closed. The mail closes every day at 7 A. M. at New York, and arrives at New Haven the same evening, and at Springfield on Monday at 11 A. M., and on Tuesday at 3 or 4, P. M. It was held that the notice was sufficient to charge Chapin, that the notary not knowing where Chapin resided, was right in sending the notice to New Haven; that whether it arrived at New Haven on Saturday or Sunday, was immaterial; that the Bank was not bound to send to Hartford on Sunday, and that the Bank not knowing Chapin's place of residence, had used sufficient diligence to ascertain it and send the notice. Eagle Bank of New Haven v. Chapin, 3 Pick. 180.

So in a case in New York the Court held that the duty of an agent who had received a bill to procure payment, "extended no farther than to give notice to his principal, of the non-acceptance and non-payment, and to transmit the requisite protests, in order that the holder might give notice" to the prior parties. Tunno v. Lague, 2 Johns. Cas. 1.]

[(*x*) United States Bank v. Goddard, 5 Mason, 366.]

charged if a notice sent him directly by the holder would have reached him sooner. (*y*)

An agent who receives and endorses a bill or note for the sake of collection only, is considered the real holder for the purpose of receiving and transmitting notices. And therefore where notice is seasonably sent to such an endorser, and he immediately sends notice to a prior party, it is sufficient, though a direct notice sent from the holder would have reached him sooner. (*z*)

But where information of the dishonor of a bill is sent to an agent, who is not a party to the bill, with a request for him to give notice to a party to the bill residing in the same place with him, the agent is not allowed till the next day to give the notice, but must give it on the same day on which he receives it. (*a*)

Evidence of a custom of the New York banks to notify directly all parties to bills and notes lodged with them for collection, is inadmissible in an action against the drawer of a bill, for the purpose of showing that he would have received the notice of its dishonor sooner, if he had been directly notified by the bank which held it, than he was by the bank's giving notice to an endorser, and that endorser's sending notice to the drawer. (*b*)

[(*y*) Talbot v. Clark, 8 Pick. 51.]

[(*z*) Ogden v. Dobbin, 2 Hall, 112.]

[(*a*) The holders of a bill in Boston sent information to their agent in New York by mail of the dishonor of a bill, requesting him to give notice to the drawer, who also resided in New York. The mail arrives at New York early in the morning; but the agent did not give notice to the drawers until the next day after the arrival of the mail. Held that the drawers were discharged by this delay. Savage Ch. J. in giving the opinion of the Court, said, "Had this agent been a party to the bill, or had he been so only nominally by having his name on the bill for the purpose of collection, he would have been justified in withholding the information one day, according to the authority first cited. But as he was the mere agent of the plaintiffs, he should have given immediate notice." After citing and commenting on United States v. Barker, 12 Wheat. 559, he proceeds, "It is reasonable also that if a party chooses to give notice through an agent, he shall cause such notice to be given as early as the defendant would have received the same notice had it been sent by mail." Sewall v. Russell, 3 Wend. 276.

See also United States v. Barker's Administrator, 4 Wash. C. C. R. 464.]

[(*b*) Mead v. Engs, 5 Cowen, 303. The bank in which the bill in

Where an agent had received a bill in order to procure payment, it was held that if the agent himself undertook to give notice to the drawer, it would be sufficient, if it was given as soon as it could have been received from the holder; although the notice would not have been sufficiently early, if the agent had been the proprietor of the bill. (*c*)

A person whose name is not upon a bill or note as a party, though interested in it, is not entitled to the benefit of the rule allowing each party a day to notify prior parties. (*d*)]

If a trader, who receives a bill from his traveller, do not know where the person, whose name stood last upon the bill when he received it, lives, he may give notice to his traveller, and a notice from the traveller to that person will be in time. (110)

Though the sending to the traveller create a delay of several days. (110)

And if the holder employ an attorney to find out where a party entitled to notice lives, the attorney has a day after he

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this case was lodged was in Rhode Island, not in New York. If, however, it had been in a New York bank it probably would not have varied the decision. Sutherland J. in giving the opinion of the Court, says, "The evidence of custom which was rejected by the judge was in no respect material. It is prudent, and probably customary for the holders of bills to give notice of their dishonor to all the parties to the bill. But if the holder is satisfied with the responsibility of his immediate endorser, there is no necessity of his giving notice to any previous party; and if such notice is given by the other parties to the bill, the holder may recover against any of them."]

[(*c*) Tunno v. Lague, 2 Johns. Cas. 1.]

[(*d*) Flack v. Green, 3 Gill & Johns. 474.]

(110) Baldwin v. Richardson, 1 Barn. & Cr. 245. In an action by endorsee of a note against endorser, the defence was, that plaintiff had been discharged by the laches of Waller, a subsequent endorsee, who lived at Luton in Bedfordshire, and that the notice therefore from plaintiff to defendant was too late. Waller received the note by remittance from his traveller, who gave provincial notes for it to one Wilson, and plaintiff's was then the last endorsement upon it. The traveller did not apprise Waller where plaintiff lived, nor did Waller know: he therefore wrote to his traveller, who was at Edinburgh, and the traveller immediately gave plaintiff notice, but plaintiff did not receive the notice so soon by several days as he would, had it been sent to him direct from Luton. Abbott C. J. thought this no defence. On motion for new trial, it was urged, that Waller's traveller should, when he remitted the note, have stated where plaintiff lived; but the Court thought otherwise, and that the notice to plaintiff was in time. Rule refused.

receives the information to apprise his client of it, and to receive his directions. (111)

It is no excuse, for not giving notice the next day after a party receives one, that he received his notice earlier than the preceding parties were bound to give it; and that he gave notice within what would have been proper time if each preceding party had taken all the time the law allowed him. The time is to be calculated according to the period when the party in fact received his notice. (112)

Nor is it any excuse that there are several intervening parties between him who gives the notice and defendant to whom it is given; and that if the notice had been communicated through those intervening parties, and each had taken the time the law allows, the defendant would not have had the notice sooner. (112)

[In case of a note payable on demand, it seems that although the holder is not required to make an immediate demand on the maker, yet when he has made a demand, and payment is refused, immediate notice must be given to an endorser in order to charge him. (*e*)]

Sending a verbal notice to a merchant's counting-house (113) in the ordinary hours of business, at a time when he or

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(111) See Firth v. Thrush, post, n. (125).

(112) Turner v. Leech, 4 B. & A. 454. Plaintiff was the eleventh endorser to a bill, defendant the 8th; plaintiff endorsed it to Bennett, Bennett to Fletcher, Fletcher to Hordem, and Hordem to Sansom; it was dishonored Saturday, 30th August, and on Monday, 1st September, Sansom gave notice to Hordem; this reached Hordem the 2d, and the same day he gave notice to Fletcher; Fletcher sent notice to Bennett on the 3d, and this notice reached Bennett on the 4th; he did nothing till the 8th, and then he gave notice to plaintiff, who paid the bill. Plaintiff sued defendant, and on case plaintiff urged that Bennett's laches had not discharged defendant, because defendant had notice as soon as if each party between him and Sansom had taken the time the law allowed them; but the Court was clear that defendant was discharged, and judgment for defendant.

[(*e*) See Shaw v. Griffith, 7 Mass. R. 494.]

(113) Goldsmith v. Bland, at Guildhall, cor. Lord Eldon, 1 March, 1800. The plaintiffs sued the defendants as endorsers of two foreign bills, and to prove notice the plaintiffs showed that they sent a clerk to the defendant's counting-house, near the exchange, between four and five o'clock in the afternoon; nobody was in the counting-house; the clerk saw a servant girl at the house, who said that nobody was in the

some of his people might reasonably be expected to be there, is sufficient; it is not necessary to leave or send a written notice, or to send to the house where he lives. (114)

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way, and he returned, having left no message with her. Lord Eldon told the jury, that if they thought the defendants ought to have had somebody in the counting-house at the time, he was of opinion, that the plaintiffs had done all that was necessary by sending their clerk; that the notice was in law sufficient, if the time was regular, whether the defendants were solvent at the time or not. The jury thought that the defendants ought to have had somebody in the counting-house at the time, and that the plaintiffs had done all that was necessary. Verdict for the plaintiffs for 1633*l*. [See also Bank of Kentucky v. Brooking, 2 Litt. 4.]

(114) Cross v. Smith, 1 M. & S. 545. Smith and Co. of Hull, had a bill for 3176*l*. drawn by Fea and Co., accepted by Tuke, payable at Smith, Payne, and Smith's, due 12th of April, 1810; this bill they remitted to Smith, Payne, and Smith, their correspondents. Tuke banked with Smith and Co.; 6th of April, Tuke directed Smith and Co. to write to Smith, Payne, and Smith not to pay this bill; they did so, and when the bill was due, it was protested and sent to Smith and Co. Fea and Co. had a counting-house at Hull, where they were merchants, and one lived within one mile, and the other within ten, of Hull. The morning after Smith and Co. received the bill, their clerk went to give notice, and called at the counting-house of Fea and Co. about half after ten; he found the outward door open, the inner one locked; he knocked so that he must have been heard had any one been there; waited two or three minutes and went away; on his return he saw Fea and Co.'s attorney, and told him. The next morning he went again at the same hour, but with no better success. No written notice was left, nor was any notice sent to the residence of either of the partners. Fea and Co. became bankrupts, and their assignees insisted that Smith and Co. had made this bill their own, and were not entitled to carry it to the debit of Fea and Co.; first, because they ought to have given notice of the directions they received from Tuke, to prevent payment by Smith, Payne, and Smith; and secondly, because calling at the counting-house without leaving a written notice, and without sending one to the residence of one of the partners, was not sufficient notice of the bill's dishonor. On case, and time to consider, the Court thought the notice to the attorney nothing, because he was not the proper person to receive such a notice; but they held, that Smith and Co. were not bound to give notice of the directions they had received, and that it would have been a breach of confidence in them to have done so; and they held, that going to the counting-house at a time it should have been open, was sufficient; and that it was not necessary to leave a written notice, or to send to the residence of any of the parties; postea to defendants.

Bancroft v. Hall, Holt, 476. Endorsee of bill against drawer. Plaintiff received notice of the bill's dishonor at Manchester, 24th of May; the same day he sent a letter by a private hand to his agent at Liverpool, to give defendant notice; the agent called at defendant's counting-house about six or seven, P. M., but the counting-house was shut

[Sending notice to a person's dwelling-house is sufficient. (*f*)

And if the house be locked up and no person there, in consequence of the temporary absence of the party, it is not necessary to leave a notice at the house, or to ascertain where he has gone to. (*g*)

Where an endorser of a note occupies a dwelling-house, except one room, which is occupied by another person, a notice left at that room is not sufficient to charge the endorser. (*h*)

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up, and defendant did not receive notice till the morning of the 27th, Monday. Two points were ruled,—1st, that sending by a private hand to an agent to give notice was sufficient; 2dly, that it was sufficient for the agent to take the ordinary mode to give notice; the ordinary time of shutting was eight or nine.

A verbal notice to an endorser of a note was held to be sufficient, in Cuyler v. Stevens, 4 Wend. 566; and Rahm v. Philadelphia Bank, 1 Rawle, 335.]

[(*f*) Franklin v. Verbois, 6 Louisiana R. 727.]

[(*g*) Williams v. the Bank of the United States, 2 Pet. Sup. C. R. 96. A notary public, employed for the purpose, called at the house of the endorser of a note to give him notice of its dishonor, and finding the house shut and locked, ascertained from inquiry of the nearest resident, that the endorser and his family had left town on a visit. He made no further inquiry where the endorser had gone, or how long he was expected to be absent, and made no attempt to ascertain whether he had left any person in town to attend to his business; but left a notice of the dishonor of the note at an adjoining house, requesting the occupant to hand it to the endorser on his return. It was held that this was sufficient diligence on the part of the holder of the note to charge the endorser.

Where the endorser of a note shut up his house in town soon after the note was made, and before it became due, and retired to his house in the country, intending however only a temporary residence in the country; it was held that a notice left at his house in town, being put into the keyhole, was sufficient to charge him. Stewart v. Eden, 2 Cain. R. 121.]

[(*h*) Corcoran, the endorser of a note, at the time it fell due occupied a dwelling-house, except the lower front room, which was occupied by his son, who did not reside in his family, as a store. This store had a separate entrance from the other part of the house, and no passage through it to the rest of the house. Corcoran was at that time postmaster of the town, and kept the post-office in another part of the town where he also transacted his private business. He had no concern in his son's store, though he was frequently about the door. Until he took charge of the post-office, which was a year before the note fell due, written communications and notices for him were sometimes left at the store, and were carried to him by another of his sons, except when he forgot it. After Corcoran took possession of the post-office, if notices had been brought to the store, the bearer would have been

Where the endorser of a bill or note resides at a private boarding-house, but is not in when the person calls to give him notice of its dishonor, a written notice left in the hands of a fellow boarder, with a request to him to deliver it to the endorser, is sufficient. (*i*)]

But telling a man's attorney that a bill is dishonored, is no notice, unless the attorney has more than the usual powers. (115)

[So where the name of an endorser on a note is signed by another person as his attorney, under a power to endorse notes for him, a notice to the attorney is not sufficient to charge the endorser, the authority to endorse not being of itself an authority to receive notices. (*k*)]

Though the endorser of a bill receive directions from the acceptor, to send word to the house at which it is payable to forbid its payment, and he do so, he is not bound to give any notice of those directions to any of the parties to the bill.(115)

And he is entitled to act as though he had received no such directions. (115)

And it is the same if the holder of the bill receive those directions.

[Where the holder of a note payable on demand, gives it to an endorser for him to collect the money of the maker, this is not sufficient notice to charge the endorser. (*l*)

Where the second of a set of exchange was accepted and protested for non-payment; and the protest, together with the first of the set, was sent back and presented to an endorser, and payment requested of him, it was held that the notice was sufficient. (*m*)]

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directed to take them to the post-office; or they would have been carried to him by his son, if recollected. It was held that a notice of the dishonor of the note, left at the store, was not sufficient to charge Corcoran as endorser. The Bank of the United States v. Corcoran, 2 Pet. Sup. C. R. 121.]

[(*i*) Bank of the United States v. Hatch, 6 Pet. S. C. R. 250.]

(115) Cross v. Smith, antè, p. 272.

[(*k*) Richards v. Morgan, 16 Martin, 89.]

[(*l*) Agan v. M'Manus, 11 Johns. R. 180.]

[(*m*) Kenworthy v. Hopkins, 1 Johns. Cas. 107.]

Sending (116) notice by the post is sufficient, though it be not received; and where there is no post, it is sufficient to send by the ordinary mode of conveyance.

Therefore, in the case of a foreign bill, it (117) is sufficient to send it by the first regular ship bound for the place to which it is to be sent; and (117) it is no objection, that if sent by a ship bound elsewhere, it would by accident have arrived sooner, though the holder wrote other letters by that ship to the place to which the notice was to be sent.

[Where the country on which a bill is drawn is at war with that in which it is drawn and endorsed, the holder of the bill, in order to maintain his action against the drawer or endorser, must prove that notice of the dishonor of the bill was sent by the first vessel which sailed with his knowledge or that of his agent. (*n*)

In a place, like Havana, where vessels are not allowed to clear out during the Christmas holidays, it seems that it is not

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(116) Saunderson v. Judge, antè, p. 201. note (13). The holder of a note wrote to the defendant, who was one of the endorsers, to say it was dishonored, and put the letter in the post, but there was no evidence that it ever reached the defendant; and the Court held, that sending the letter by the post was quite sufficient. S. P. Kuth v. Weston, 3 Esp. N. P. C. 54. In Scott v. Lifford, 9 East's Rep. 347. and 1 Camp. N. P. C. 246., the parties lived in London and its vicinity, within reach of the twopenny post; notice of the dishonor of the bill was sent by that conveyance, and the Court of King's Bench held that it was sufficient. The notice, however, must appear to have been put in in due time. Hilton v. Fairclough, 2 Campb. 633.

So it has been held that puting a notice into the post-office is conclusive evidence of notice; even if the party to whom it is directed can prove that he never received it. Shed v. Brett, 1 Pick. 401. See also Munn v. Baldwin, 6 Mass. R. 316.]

(117) Muilman v. D'Eguino, antè, p. 214, n. (33). To debt, on bond conditioned to pay certain bills drawn on India at sixty days' sight, in case they should be returned protested, defendant pleaded that he had not notice so soon as he should have had. It appeared that notice was sent by the first English ships, but that by the accidental conveyance of a foreign ship not bound for England, and by which the holder wrote to England upon other matters, notice might have been sent sooner, and would have arrived sooner; but Eyre C. J. told the jury, that notice by the first regular ships bound for England was sufficient, and that it was not necessary to send notice by the chance conveyance of a foreign ship. The jury found for the plaintiff, and the Court was satisfied with the verdict, and refused a new trial.

[(*n*) United States v. Barker's administratrix, 4 Wash. C. C. R. 464. But see United States v. Barker, 1 Paine, 156.]

necessary during that period to write a notice of the dishonor of a bill to be sent to a foreign port. (*o*)]

It is not essential the notice should be sent by the post where there is one; sending to an agent by a private conveyance, that he may give the notice, will be sufficient, if the agent give the notice, or take due steps for the purpose, without delay. (118)

And it will be of no consequence though the notice by the agent be not quite so early as notice by the post would have been. (118)

A letter directed to a man at a large town, without specifying the part in which he lives, the trade he carries on, or any other circumstance to distinguish him, may be sufficient, if he be the drawer, and has dated the bill generally at that place. (119)

Or if, upon reasonable inquiry, no information can be obtained to enable the party to give a better direction.

But, primâ facie, such a direction will be insufficient, because it is not likely, upon such a direction, the letter will reach the person for whom it is intended, in proper time. (120)

If, however, it be proved that there was a directory at the time for that place, and that a reference to the directory would have shown in what part of the place the person intended, lived, such a direction might perhaps be held sufficient.

[The sufficiency of a notice sent by the mail is well established in the United States, where the person to be charged

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[(*o*) Martin v. Ingersoll, 8 Pick. 1.]

(118) See Bancroft v. Hall, antè, p. 272.

(119) Mann v. Moss, 1 Ryan & Moody, 249. Upon a bill dated generally "Manchester," the letter giving notice to the drawer was addressed to him generally at Manchester; and Lord Tenterden held it sufficient.

(120) Walter v. Haynes, 1 Ryan & Moody, 149. To prove notice to defendant, an endorser, it was proved that a letter containing notice, directed to "Mr. Haynes, Bristol," was put into the post-office in proper time. Abbott C. J. thought that, in so populous a place as Bristol, the direction was too general, as there might be many persons at Bristol of that name; and he considered there ought to be proof that the letter had reached the defendant: further proof was then given, and plaintiff had a verdict.

resides in a different town or place from that in which the presentment is made. (*p*)

But where he resides in the same place, a notice to him put into the post-office is not sufficient; but the notice to him must be personal, or left at his residence or place of business. (*q*)

[(*p*) Munn v. Baldwin, 6 Mass. R. 316; Lincoln and Kennebec Bank v. Hammatt, 9 Mass. R. 159; Bussard v. Levering, 6 Wheat. R. 102; Lindenberger v. Beall, 6 Wheat. R. 104; Shepard v. Hall, 1 Conn. R. 329; Smith v. Hawthorn, 3 Rawle, 355. See also Ferris v. Saxton, 1 South. R. 1.

If notice to an endorser is sent by mail, directed to him at the post-office in the parish where he resides, it is sufficient unless he shows that there is another post-office in the parish or elsewhere nearer to his residence. Yeatman v. Erwin, 5 Miller, 264. It may be questioned, whether it ought to avail the endorser to show that there is another post-office *out of his parish*, which is nearer to his residence.

By statute in Louisiana, whenever the residence of a party to a bill or note is unknown to the notary who protests it, and he cannot ascertain it after due diligence, a notice put by him into the nearest post office, addressed to the party at the place where the bill or note was drawn, is made legal notice of the protest. Statute March 13, 1827, quoted in Preston v. Dayson, 7 La. R. 7.

The notary's certificate in such case is *primâ facie* evidence of due diligence, but liable to be rebutted by other evidence. Preston v. Dayson, 7 La. R. 7.

[(*q*) Ireland v. Kip, 10 Johns. R. 501, and S. C. 11 Johns. R. 231; Smedes v. Utica Bank, 20 Johns. R. 372; Shepard v. Hall, 1 Conn. R. 329; Laporte v. Landry, 17 Martin, 359; Clay v. Oakley, 17 Martin, 137.

In an action against the endorser of a note, who resided within the limits of the city of New York, at Kip's Bay, about three and a half miles from the post-office, a place to which the letter carriers do not carry letters, it was held that a notice for him put into the post-office was not sufficient. Ireland v. Kip, 10 Johns. R. 501.

In a new trial of the same case, the plaintiff offered to prove besides the putting the notice in the post-office that the defendant had given directions to the letter carriers of the post-office, to leave all letters that came to the post-office for him at a broker's in Frankfort street in the city of New York, that the letter carriers called at the post-office three or four times every day, and took out and delivered all letters left there, and that the defendant usually called or sent every day for his letters to the house in Frankfort street. It was held, this evidence was not sufficient to maintain the action, without proof that the notice was actually delivered. Ireland v. Kip, 11 Johns. R. 231.

Louisiana State Bank v. Rowell, 18 Martin, 506, is a very similar case, and decided in the same manner.

In Louisiana, by a statute passed in 1827, where the endorser of a bill or note does not reside in the town or city where the protest is made, notice may be given him through the post-office. Where the endorser of a note resided in a faubourg of New Orleans, notice to him put into the city post-office was held insufficient. Porter v. Boyle, 8 La. R. 170.

Where there is no post-office in the town in which the party resides, perhaps a notice sent to the nearest post-office would be sufficient. (*r*)

A notice sent directed to the post-office, to which the person to be notified usually resorts for his letters, is sufficient, although he resides in a different town in which there is also a post-office: (*s*)

Even if the post-office in the town in which he resides be nearer to his residence, and though he is also in the habit of receiving letters at the post-office in the town of his residence. (*t*)

But where there are two post-offices in the same town, the one nearer to the residence of the party to be notified than the other, and he receives his letters from the post-office nearer to him, a notice to him by mail must be directed to that post-office, if it be directed to the other, it will not be sufficient. (*u*)

The two following cases seem opposed to the position in the text. Where a note was made payable at a bank in the town of A., and an endorser resided two or three miles from A., and the nearest post-office to his residence was that at A.; it was held that notice of the dishonor of the note put into the post-office at A., and directed to the endorser at A. was sufficient. Bank of Columbia v. Lawrence, 1 Pet. Sup. C. R. 578.

The Hartford Bank held a note payable at the Middletown Bank. After a presentment for payment by a notary and refusal, he enclosed a notice directed to the endorser without any place of residence, in a letter to the cashier of the Hartford Bank, requesting him to complete the direction. The cashier received the letter from the post-office at Hartford, and the endorser residing at that place returned the notice to the post-office, after adding the word "*Hartford.*" The notice was held to be sufficient to charge the endorser. Hartford Bank v. Stedman, 3 Conn. R. 89.]

[(*r*) Shed v. Brett, 1 Pick. 401; Ireland v. Kip, 11 Johns. R. 231; Davis v. Williams, Peck, 191.

But it was held in Tennessee that a notice sent to a post-office two and a half or three miles from the residence of an endorser of a note, and the post-office nearest to him, he residing eleven miles from the bank where the note was payable, was not sufficient, it not appearing that he received or sent letters at that post-office. Nashville Bank v. Bennett, 1 Yerger, 166.]

[(*s*) Reed v. Paine, 16 Johns. R. 218.]

[(*t*) Bank of Geneva v. Howlett, 4 Wend. 328.]

[(*u*) The endorser of a note resided at Canajoharie, in which place there are two post-offices, one designated as the Canajoharie Post-office, the other as the Canajoharie central post-office. The Canajo-

A mistake in the name of a post-office to which a notice is directed, will not render it invalid, where it is customary to direct letters intended for that post-office in the same manner, and the post office is known as well by one name as the other. (*v*)

A mistake in the direction of the place in a notice does not vitiate it, where it is sent to the proper post-office. (*w*)

The holder of a negotiable paper is bound to make inquiries as to the office to which a notice should be sent. (*x*)

Where the mail to the place of residence of the party to be notified, is sometimes sent by one route, and sometimes by another, a notice sent by either route is sufficient. (*y*)]

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harie post-office was six miles from his residence; the Canajoharie central post-office three quarters of a mile. He was in the practice of receiving his letters from the latter office. It was held that a notice sent by the mail, directed to the defendant at Canajoharie, was not sufficient. Cuyler v. Nellis, 4 Wend. 398.]

[(*v*) A notice directed to Geddesburgh, when it should have been Geddes, was held good, there being no place by the name of Geddesburgh, and letters directed to Geddesburgh being always sent to the post-office at Geddes. Bank of Geneva v. Howlett, 4 Wend. 328.]

[(*w*) The endorser of a note at the time it fell due resided in Campbell County, in Kentucky, without the limits of any post-town, and about two miles from Cincinnati; and was in the habit of receiving his letters from the post-offices in Newport and Covington, in Campbell County, and also from that in Cincinnati, letters directed to him at that place, and had ordered the post-master there to detain all such letters for him until called for. The post-office at Newport was about three miles, that at Covington about two miles from the endorser's residence. A notice of the non-payment of the note which was payable at Cincinnati, was seasonably put into the post-office at that place, directed to the endorser, "Campbell County, Kentucky." Such letters the post-master was in the habit of sending by the mail to Covington, though if he had not known the residence of the party he would have sent them to Newport. Held, that the notice was sufficient. Bank of the United States v. Carneal, 2 Pet. Sup. C. R. 543.]

[(*x*) Cuyler v. Nellis, 4 Wend. 398.]

[(*y*) The endorser of a note owned by the Bank of Utica, payable at a bank in the city of New York, resided at Peterborough. Notice of non-payment to Smith was enclosed at New York to the cashier of the Utica Bank, who took it from the post-office in Utica, and put it into the post-office in Utica again the same day, directed to the endorser at Peterborough, in season to go by the same mail as if it had been originally directed to Peterborough, and not taken out of the office at Utica. There is another mail route to Peterborough, and had the letter gone by that route, it would probably have reached Peterborough a day or two sooner than it did. The Court held the notice sufficient. Spencer C. J. delivered the opinion of the Court. "I consider the mode adopted

Where it is not known where a party lives, due diligence must, in general be used to find out. (121) (122)

And where such diligence is unsuccessful, it will excuse want of notice. (121)

But merely inquiring at the house where a bill is payable, is not due diligence for finding out an endorser. (122)

Inquiry should be made of some of the other parties to the bill or note, and of persons of the same name. (122)

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in this case, in the same light as if the notary had sent a notice directed to the defendant *via* Utica; in which case I can conceive no possible objection to the notice, for it is expressly in proof, that it was as usual to send letters to the defendant by the way of Utica, as by the other route. The law does not exact of the holder of a note or bill that he shall give the earliest possible notice of its dishonor. It requires of him only reasonable diligence." Woodworth J. dissented. Bank of Utica v. Smith, 18 Johns. R. 230.]

(121) Bateman v. Joseph, 12 East's Rep. 433. In an action by an endorsee against the payee and first endorser of a bill, it appeared that the plaintiff received notice of its dishonor on the 30th of September, in time to give notice to the defendant on that day; he gave no notice, however, until the 4th of October; to excuse which, his clerk proved that the plaintiff did not know the defendant's residence until that day. Lord Ellenborough left it to the jury, whether the plaintiff had used due diligence to find the defendant's residence. They found for the plaintiff; and on motion for a new trial, the Court refused the rule, saying, whether due notice had been given was a question of law; but whether due diligence had been used, to discover the place of residence of a person entitled to notice, was a question of fact. [See also M'Clanahan v. Brandon, 13 Martin, 321.

Action against the drawers of a bill dated at New York, and drawn upon a house in that place. The defendants resided in Petersburg, (Va.) The clerk of the notary who protested the bill made diligent inquiry for the drawer's place of residence at the banks and elsewhere, and being informed that they resided in Norfolk, (Va.) he sent a notice by post, directed to them at that place, and another addressed to them at New York. It was held, that as it did not appear that the holder knew of their residence, he had used due diligence, and that the drawers were chargeable. Chapman v. Lipscombe, 1 Johns. R. 294.

See also Reid v. Payne, 16 Johns. R. 218; Smyth v. Hawthorn, 3 Rawle, 355; Bellievie v. Bird, 16 Martin, 186; Bank of Columbia v. Magruder, 6 Har. & John. 172.

Where the drawer of a foreign bill had been absent from the State for several years, the Supreme Court of Massachusetts thought that evidence of notice having been left at his former place of residence, would support an averment of due diligence in the declaration. Blakely v. Grant, 6 Mass. R. 386. But it does not appear from the case as reported, why a notice might not have been sent to the drawer, or that he had not some known domicil or place of business in the foreign country where he drew the bill.]

(122) Beveridge v. Burgis, 3 Campb. 262. In an action by the en-

Calling on the last endorser, and last but one, the day after the bill becomes due, to know where the drawer lives, and, on his not being in the way, calling again the next day, and then giving the drawer notice, may be sufficient. (123)

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dorsee of a bill against the endorser, the excuse for not giving notice to defendant was, that plaintiff did not know his residence, but the only inquiry he proved was at the house where the bill was made payable. Sed per Lord Ellenborough, how could he expect information there? he might have inquired of other parties to the bill, or of persons of the same name in the directory: ignorance may excuse notice, but reasonable diligence must be used to obtain knowledge. Nonsuit.

[Inquiry for the residence of the endorser of a note of the maker and other endorsers, is evidence of due diligence to ascertain it. Preston v. Daysson, 7 La. R. 7.

Action against the drawer of a bill drawn at Alexandria, D. C. on New York. The bill being protested for non-payment, two letters containing notice were immediately after put into the post-office at New York, one directed to the drawer at New York, and the other to him at Alexandria; and a third notice for him was left at the counting-house of the acceptors. It did not appear that any inquiries were made as to the drawer's place of residence. He in fact resided at Fairfield in Connecticut, and this was publicly known, and particularly to one of the acceptors of the bill. It was held that the notice given was not sufficient; and that the drawer was discharged, because due diligence had not been used to ascertain his place of residence. Barnwell v. Mitchell, 3 Conn. R. 101.

Action against the endorser of a promissory note, payable at the Bank of Utica. When the note fell due, notice of its non-payment was given by a letter put into the post-office, directed to the defendant at Canandaigua. The defendant in fact lived at Ovid, in the county of Seneca, and had resided there for ten years previous. It was proved that the book-keeper who gave the notice was informed by the cashier and some of the directors of the bank, that the defendant resided at Canandaigua. Spencer J. delivered the opinion of the Court. "The notice is bad. With ordinary diligence the place of his abode might have been ascertained; and it must be the plaintiff's loss, not the defendant's, that the notice was not given." Judgment for defendant. Bank of Utica v. De Mott, 13 Johns. R. 432.]

(123) Browning v. Kinnier, Gow. 81. Defendant endorsed to Newman, Newman to Maberly, Maberly to Chesterman, and Chesterman to plaintiff; the bill became due 23d November; on the 24th plaintiff applied to Chesterman to know where defendant lived; Chesterman could not tell, and referred him to Maberly; he called on Maberly at four P. M., but Maberly not being at home, he did not repeat his call till the next morning, and then Maberly gave him the information, and he gave defendant notice. Dallas C. J. thought reasonable diligence had been used, but he left the question to the jury, who were of the same opinion.

[Smyth v. Hawthorn, 3 Rawle, 355. Action against the endorser of of a note. The note fell due in New York on Saturday August 12. It had been left in a bank for collection by a subsequent endorser. On the next Monday a notary employed by the bank inquired of the en-

But if a party when he passes a bill or note decline saying where he lives, and undertake to call upon the acceptor to see if the bill is paid, he cannot complain of want of notice. (124)

Where the residence of a party entitled to notice is unknown, and the person next to him upon the bill or note will give no information where he lives, a note addressed to the former, if sent to the place where such latter person lives, will be sufficient. (125)

Though the application for information be made before the bill or note is due. (125)

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dorser who had placed the note in the bank, where the defendant lived. The person inquired of only knew that he did not reside in New York; and the notary went to another person, to make further inquiry. A notice sent to the defendant the next day, Tuesday, was held to be seasonable.]

(124) Phipson v. Kneller, 4 Campb. 285; 1 Stark. 116. Plaintiff, the holder of a bill, asked defendant, the drawer, where he lived; he said, he had no regular residence, but lived amongst his friends, and he would call himself upon the acceptor, and see if the bill was paid. Lord Ellenborough held that this dispensed with all notice, and threw it upon defendant to inquire; and plaintiff had a verdict.

(125) Firth v. Thrush, 8 Barn. & Cr. 387. Major drew a bill to his own order, dated Frome: he endorsed it to defendant; by defendant's authority he endorsed it, in defendant's name, back again to himself, and then endorsed it to Swaine & Co., who endorsed it to plaintiff: before the bill became due, plaintiff applied to Swaine and Co. for information respecting defendant, but they could give him none: he and Swaine and Co. then applied to Major, and also to Miller (Major's attorney), who acted as attorney for defendant in this suit; but they gave for answer, that plaintiff must not expect to get any thing from defendant, and were silent as to his place of residence. The bill became due 4th August, and was dishonored: plaintiff employed Pownall to give notice; and on 5th August he gave notice to Swaine and Co. and Major, and addressed a letter containing notice to defendant at Frome: that notice was returned 24th September, defendant not being found: plaintiff then directed Pownall to do all he could to find out defendant's residence; Pownall wrote immediately to an attorney at Frome, and received an answer, the 16th October, that defendant lived at Burton. On the 17th Pownall informed plaintiff, and on the 18th wrote again to defendant, giving him notice; and whether this notice was in time was the question. Lord Tenterden inclined to think that notice to Major was, under the circumstances, notice to defendant: but on rule nisi for a nonsuit, and cause shown, the ground on which he and the rest of the Court proceeded was, that there was no laches; that all that could be expected was done when the bill was first dishonored; and that when Pownall received the information where defendant lived, he had a right to communicate it to his client, and take his directions upon it, and that he was entitled to a day for that purpose. Rule discharged.

Especially if the person applied to has acted in any respect, with regard to the bill or note, as agent for the party entitled to notice. (125)

And, if the holder employ an attorney to give notice, and the attorney after a lapse of time discover where the party lives, he may take a day to apprise the holder, and take his further directions, before he gives the notice. (125)

[There is no presumption of law that the place where a bill is drawn is the place of the drawer's residence. Therefore, if he do not in fact reside there, a notice sent addressed to him there is not sufficient, if no inquiry be made to ascertain his place of residence. (*z*)

A notice sent to the place where a party to a bill or note resided at the time it was made or taken by the holder, is sufficient, although the party may have removed to another place before the dishonor of the bill or note; if the holder does not know and has no reason to suspect this change of residence. (*a*)

If due diligence be used to ascertain the place of a party's residence, and notice sent according to the information receiv-

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[(*z*) Hill v. Vanell, 3 Greenl. 233. A bill was drawn at New Orleans on a person in York, Maine, and payable in Boston. In an action against the drawer, it appeared that no inquiry had been made to find him, when the bill was dishonored, but notice was put into the post-office, directed to him at New Orleans. He in fact resided in York. The Court held that due diligence had not been used, and Mellen C. J., who gave the opinion of the Court, thought that inquiry for the drawer should have been made by writing to the acceptor at York; and that if this had delayed the notice for a short time, it might still be evidence of due diligence.

See also Fisher v. Evans, 5 Binn. 541.

A different opinion seems to be expressed in a case in South Carolina. Action against the endorser of a note dated at Charleston. A notice to the endorser was left at a house where he usually lodged when in town, he then being absent. The case however does not state whether Charleston was his usual residence or not. Bay J. delivered the opinion of the Court. "Charleston being the place where the note was drawn and endorsed, shall be presumed to be the residence of both (maker and endorser) for every mercantile purpose; and the use of due diligence to find out either of them there will answer the demands of the law upon this subject." Moodie v. Morrall, 1 S. Car. R. 307.]

[(*a*) M'Murtrie v. Jones, 3 Wash. C. C. R. 206; Bank of Utica v. Phillips, 3 Wend. 408.]

ed, it is sufficient, though he do not in fact reside in the place to which the notice is sent. (*b*)

If notice to an endorser be not sent to the proper place, yet it seems he will be chargeable, if the notice in fact come into his hands seasonably. (*c*)

If the endorser of a note, a foreigner, before it falls due, inform the holder that he is going out of the country to a foreign port, which he mentions, it will not excuse the holder for not attempting to give him notice. It seems that he should send notice to the place where the endorser said he was going to. (*d*)]

If a party entitled to notice become bankrupt, but assignees are not chosen, notice to him is sufficient; there need not be any further notice when assignees are chosen. (126)

But if he have absconded, and assignees be chosen, and the holder know it, he must give notice to the assignees. (127)

Especially if the bankrupt's house be still open, and the messenger under the commission be in possession of it. (127)

[(*b*) In an action against an endorser of a note, by a bank which had discounted it for the accommodation of the maker, it appeared that when the note was presented for discount by an agent of the maker, he informed a clerk in the bank that the endorser resided at Bainbridge, at which place the note was dated. The clerk made a memorandum of the endorser's place of residence; and the note being dishonored, a notice was sent by the post-office directed to him at Bainbridge. He in fact resided at Masonville, twelve or fourteen miles from Bainbridge, but had resided at Bainbridge until a few weeks previously to the date of the note. It was held that the endorser was liable, on the ground that the bank had taken sufficient care to ascertain his place of residence. Bank of Utica v. Davidson, 5 Wend. 587. See also Dunlap v. Thompson, 5 Yerger, 67.]

[(*c*) Bank of the United States v. Corcoran, 2 Pet. Sup. C. R. 121. But see Dunlap v. Thompson, 5 Yerger, 67. In this case the jury were instructed, that if they *believed it probable* that notice directed to a wrong place reached the defendant as soon as if it had been rightly directed, they might find for the plaintiff. This was held to be wrong, and a new trial granted.]

[(*d*) Hodges v. Galt, 8 Pick. 251.]

(126) Ex parte Moline, 19 Ves. 216. The drawer of a bill became bankrupt: the bill was dishonored the day of the second meeting under his commission, and notice was given him before the choice of assignees: it was insisted that notice should have been given to the assignees. Sed per Lord Eldon C., "the notice was quite sufficient: the bankrupt represents his estate till assignees are chosen."

(127) Rohde v. Proctor, 4 Barn. & Cr. 517. Five bills drawn by Rains on Lachlan became due in June, 1818; Rains absconded and

Notice to one of several partners, is notice to all: and when a bill has been drawn by a firm upon one of the partners, and by him accepted and dishonored, it is (128) unnecessary to give notice of such dishonor to the firm; for, this must necessarily be known to one of them, and the knowledge of one is the knowledge of all.

[So where the drawer of a bill is a partner in the house on which it is drawn, he is chargeable without any notice being given him of the dishonor of the bill. (*e*)

If a bill or note be endorsed by a partnership, and the partnership be dissolved before it becomes due, a notice to one of the partners is still sufficient, if the holder has not had notice of the dissolution. (*f*)

Where two persons not partners are joint endorsers of a bill or note, notice must be given to each one of them; (*g*) and this, it seems, is necessary in order to charge either. (*h*)

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went abroad 17th April, 1818, and on the 20th a commission of bankruptcy issued against him, and defendants were his assignees. 23d April, Lachlan became bankrupt. Rains's house continued open till after June: the messenger under the commission was in possession of it; and the holders knew that defendants were Rains's assignees; but no notice was given of the dishonor. Case from Chancery, on question whether the bills were provable under the commission against the drawer, Rains?—The Court of King's Bench certified they were not. [S. C. 1 Mont. & Mac. 430.]

(128) See Porthouse v. Parker and another, post, in which Lord Ellenborough held that the plaintiff was not bound to prove that the defendants had received express notice of the dishonor of the bill, assigning the reason mentioned in the text.

[(*e*) In an action against J. Jackson, as drawer of a bill, on which due notice of non-acceptance had not been given, it was proved that the drawer was a partner in the firm of Jackson and Brothers, the drawees. It was held that he was chargeable without any notice. Spencer C. J. delivered the opinion of the Court. "In the absence of all other proof, the bill must be considered as drawn by one partner of the firm on the firm itself, in relation to the partnership business; and if so, then a knowledge of one of the firm of the dishonor of the bill, is, in point of law, knowledge by the whole firm. D. Jackson, the partner in London, had notice that the bill was refused acceptance, for he was the person who had refused. Although J. Jackson is alone sued on the bill, yet it must be deemed a partnership transaction; and a knowledge by one of the firm of the dishonor of the bill, is all that ought to be required." Gowan v. Jackson, 20 Johns. R. 176.

But see Dwight v. Scovil, antè, p. 245.]

[(*f*) Nott v. Downing, 6 Louis. R. 684.]

[(*g*) Shepard v. Hawley, 1 Conn. R. 368.]

[(*h*) Bank of Chenango v. Root, 4 Cowen, 126.]

Where the officers of a corporation draw an order on its treasurer, though a presentment to him is necessary, no notice is necessary before suing the corporation. (i)]

If the holder give due notice of the bill's dishonor, but intimate that he expects it will be paid in a given time, and that he will keep it that time without putting more expense upon it, unless the person written to object, it will be no answer to an action afterwards against the person written to, that he had no notice, upon the expiration of the extended time, of non-payment. (129)

The law does not require a second notice when the extended time expires. (129)

But, if the party written to, sustain any damage from not having such notice, he may perhaps be entitled to bring an action on that account. (129)

The (130) drawer of a bill, and every endorser of a bill or note, is, primâ facie, to be presumed entitled to bring an action on paying it, and therefore entitled to insist on a want of notice, or on a neglect to make a proper presentment; but the contrary (131) may be proved.

[(i) The selectmen of a town drew an order upon the treasurer of the town. The Court held that a presentment was necessary before an action could be brought against the town, but seemed to think that in case of presentment and non-payment, it would not be necessary to give notice to the selectmen. Varner v. Noble, 2 Greenleaf, 121.]

(129) Foster v. Jurdison, 16 East, 105. Endorsee against drawer. When payment was refused, plaintiffs apprised defendants thereof, but added, they had reason to believe a friend would advance the money for the acceptor in a few days, that they would therefore hold it till the end of the week without putting more expense upon it, unless they heard from defendant to the contrary; the bill was not paid, but no further application was made to defendant for near two months: action; and Wood B. being of opinion that plaintiff should have given a second notice at the end of the week, and the jury thinking that certain circumstances proved did not amount to a waiver of the want of such notice, verdict for defendant: but, on rule nisi for a new trial, and cause shown, the Court thought plaintiffs had done all the law merchant required by giving one notice; that they then, at the highest, made themselves agents for defendants, to endeavor to get payment, and if any damage resulted to defendant for want of notice, it might perhaps entitle him to call on defendant or his agent by action; but, that it was no defence to the action. Rule absolute.

(130) Vide Bickerdike v. Bolman, post, note (140.), and Rogers v. Stephens, post, note (137).

(131) Bickerdike v. Bolman, post, note (140); Rogers v. Stephens, post, p. 294., note (137); and Goodall v. Dolley, post, note (138.)

And the representative of such drawer, &c. in case of death, bankruptcy, &c. stands in his place, and is equally entitled to notice.

[In an action against a party for endorsing a note as agent of another without authority, it has been held that notice to the agent or the principal must be proved. (*k*)

If the drawer of a bill or the endorser of a bill or note be dead at the time it becomes due, and there be executors or administrators, at that time, known to the holder, notice must be given to them; but if there be no executor or administrator at the time, a notice sent to the residence of his family is sufficient; and it is not necessary to give notice afterwards to executors or administrators subsequently becoming such. (*l*)]

A surety, though not a party to a bill or note, may be discharged by want of notice and neglect to present, if it be probable he would otherwise have been safe (132);

As, if the parties who ought to have paid were solvent when the bill or note became due, and have failed since. (132)

[(*k*) Clay v. Oakley, 17 Martin, 137.]

[(*l*) Action against the executors of an endorser. The endorser died at sea before the note fell due; but neither was his death known to the holders of the note, nor his will proved, until some time after. A notice of non-payment directed to the endorser, was left at his last residence, another sent to his family in the country by the post office, and a third left with his reputed agent. Verdict for plaintiffs; and motion for new trial, on the ground that notice ought to have been given to the executors within a reasonable time after probate of the will. Spencer C. J. delivered the opinion of the Court. "The holders of the note gave all the notice in their power to give, when the note fell due. The rights of the holder of a note or bill, are to be determined by his acts, when the note or bill becomes due; and if he then gives such notice, as under the existing state of facts the law requires of him, his rights are fixed, and he cannot be required to superadd any other notice at a future period." Merchants Bank v. Birch, 17 Johns. R. 25.

In a previous case, where the endorser died before the note became due, and his will was not proved until some time after, it was held that a notice left at his former residence was sufficient. Stewart v. Eden, 2 Cain. R. 121.]

(132) Philips v. Astling, 2 Taunt. 206. The declaration stated, that in consideration that the plaintiff would sell and deliver to Davenport and Finney certain goods, to be paid for by a bill to be drawn by Davenport and Finney on Houghton at six months, the defendants undertook to guaranty the payment of such bill. It then averred delivery of

But, a person not party to a bill or note cannot complain of laches, or want of notice, unless he can show it has done him prejudice. (133)

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the goods, acceptance of the bill, its presentment for payment, and dishonor. At the trial, it appeared that Houghton was at sea when the bill became due, which was on the 14th of July, 1808, but, that he had an agent residing in London, authorized to accept bills, and who had accepted this; that no presentment for payment was made to this agent when the bill became due; that on the 16th of July, the plaintiff gave Davenport and Finney notice that the bill remained unpaid, but no notice was given to the defendants. In February, 1809, Davenport and Finney became insolvent, and Houghton was declared a bankrupt in July, 1809, after which, payment was demanded of the defendants. A verdict was found for the plaintiff, but the Court, upon a rule nisi for a nonsuit, after referring to Warrington v. Furbor (infrà), said, that here the insolvency of the drawers, and the bankruptcy of the acceptor, did not happen until long after the bill became due, and that for any thing that appeared, if the money had been demanded either of the drawer or acceptor, the bill might have been paid: but that the necessary steps not having been taken to obtain payment from the parties who were liable upon the bill, and solvent, the guaranty must be discharged, and therefore they made the rule absolute.

(133) Warrington and another v. Furbor and another, 8 East, 242. The plaintiffs guarantied the payment of the price, to the extent of 1000*l.* of goods, to be sold by one Martin to the defendants, at six months' credit. The goods were furnished, and the defendants accepted a bill at six months, for the value. This bill became due on the 3d of December, 1801; but on the preceding 21st of November the defendants became bankrupts. The plaintiffs were therefore obliged to pay the 1000*l.*, and now brought this action to recover the same. It was objected that the plaintiffs had not proved a presentment of the bill to the defendants for payment, without which, it was urged, that Martin could not have recovered against the plaintiffs, and therefore that the latter had paid the money in their own wrong. Lord Ellenborough held the proof unnecessary; this not being an action on the bill, and the defendants having been recently stripped of all their property; and the plaintiffs had a verdict. On rule nisi to set it aside, and cause shown, the Court held the verdict right: and Lawrence J. said, the guarantees were not prevented from showing that they ought not to have been called upon at all, for that the principal debtors could have paid the bill if demanded of them. Rule discharged.

Swinyard v. Bowes, 5 M. & S. 62. Action for goods sold. Defence, that plaintiff had drawn on Chesner, a debtor of defendant, for the amount, and had given defendant no notice of the dishonor of that bill: Chesner was bankrupt the week after the bill became due, and was not in a condition in the interim to pay it. Bayley J. thought the defendant not within the custom of merchants, because he was not party to the bill; and as he did not appear to have been prejudiced by the want of notice, the not giving it him furnished no ground of defence; and on motion for new trial, the Court thought him right, and refused a rule.

Holbrow v. Wilkins, 1 Barn. & Cr. 10. Defendants guarantied half

And if he can prove it has done him prejudice, he can only recover to the extent of such prejudice. (134)

Therefore, each case will depend upon its own peculiar circumstances. (134)

And the questions in each case will be, whether there has been any prejudice, and what. (134)

An agent, employed to present a bill for acceptance or payment, will be answerable (134) to his employer for any neglect in presenting or giving notice. (134)

And so will an agent who is employed to get it presented, if he take a commission for so doing, and have an agent in the place where it is to be presented. (134)

But if the agent so employed have no commission for getting it presented, nor any agent where the presentment is to be, he is not answerable for the neglect of the person he employs. (134)

If the person who ought to have paid the bill or note were insolvent when it should have been paid, (134) the presumption is, that the neglect did not prejudice him.

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the amount of a bill due 29th October, 1818, drawn by plaintiff on Carver and Peat. The 4th September, Carver and Peat became insolvent, and 22d September plaintiff wrote to defendant to accept a bill at a month for the sum he guarantied: defendant refused; and after 29th October plaintiff sued defendant on his guaranty. Defendant insisted that he was discharged, because the bill on Carver and Peat had not been presented for payment, nor notice of its dishonor given. It appeared, however, that it would not have been paid if presented, and that defendant had sustained no damage by the want of presentment, or of notice. Verdict for plaintiff; motion for nonsuit, and Phillips v. Astling (antè, p. 287) was relied upon: sed per Abbott C. J., there the insolvency did not happen till after the bill became due, which makes a material difference between the cases: here defendant knew before the bill became due, that Carver and Peat were insolvent, and that he should be looked to for payment. Rule refused.

(134) Van Wart v. Woolley, 3 Barn. & Cr. 439. Irving and Co., of New York, employed plaintiff to buy goods for them, and sent him a bill payable to his order, drawn by Cranston and Co. on Greg and Co., London. Plaintiff, who lived at Birmingham, delivered it to defendants, Birmingham bankers, to get it accepted; they sent it to Lubbock and Co., their town bankers, who presented it accordingly: the drawees refused to accept, but desired Lubbock and Co. to keep the bill till it was due, which they did. Lubbock and Co. gave no notice to defendants till payment was refused; and, when Irving and Co. had notice of non-payment, they refused to take back the bill, on the ground of laches as to notice of non-acceptance. Plaintiff therefore

[A person to whom the holder of a bill has agreed to pay the proceeds which should be realized from it, is not entitled to notice of its dishonor. (*m*)

Where an agent draws a bill in his own name, but for account of his principal, notice must be given to the agent, who is the drawer. Giving notice to the principal, who is not a party to the bill, is not sufficient. (*n*)

But where a bill was drawn by the master of a ship, on account of the owners and by their authority, but in his own name, it was held that the owners were liable on being duly notified of the dishonor of the bill. (*o*)

The neglect of the holder of a bill or note to notify any parties to it, will not discharge any other party whom he has duly notified. (*p*)]

In an action on a bond from the drawer or indorser of a bill, conditioned to pay it in a limited time after it becomes

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sued defendants, and had a verdict for the amount of the bill; but it appearing that Cranston and Co. had no effects in Greg and Co.'s hands, and had become bankrupts before the presentment for acceptance, the Court, on time to consider, held the verdict, as to the quantum, wrong; for, as Irving and Co. had not endorsed the bill, they were not within the custom of merchants as to notice, and could only complain to the extent to which they were damnified; that, as plaintiff stood merely in the character of agent for them, and had done his whole duty as such agent, they could not throw the loss upon him; and though plaintiff must be considered as having suffered some injury by having his recourse upon Cranston and Co. delayed, he would only be entitled to nominal damages in that respect, unless he could prove actual damage, and then his recovery would be limited by the amount of such damage.

[In an action brought by Van Wart against Irving & Co. in New York, in which the same facts were proved as in the preceding case, it was held that the defendants not having endorsed the bill were not entitled to notice of its dishonor, and were liable for the amount. Van Wart v. Smith, 1 Wend. 219.]

[(*m*) Hutz v. Karthause, 4 Wash. C. C. R. 1.]

[(*n*) Grosvenor v. Stone, 8 Pick. 79.]

[(*o*) Wallace v. Agry, 4 Mason, 336. As the owners in this case were not parties to the bill, were they liable upon it? The bill, if paid, or made the holder's by laches, would discharge the original debt. If not paid, could any thing more be necessary to enable the payee to sue for the original debt, than to prove due presentment and protest, and notice to the drawer of the bill?]

[(*p*) State Bank v. Hennen, 16 Martin, 226.]

due if the acceptor do not, it is no defence that the bill was not duly presented for payment. (135)

Or that due notice of its dishonor was not given to the defendant. (135)

[It is held that a joint maker of a note, signing it as surety, is not discharged by reason of a neglect by the holder, even for many years, to give him notice of the non-payment by the principal, who during the time becomes insolvent. (*q*)

If the payee of a note not negotiable, endorse it, he is, it seems, liable to the holder, without presentment or notice, being rather a surety or guarantor than an endorser. (*r*)

It has been held in several of the United States that a guarantor of a note is in all cases liable, whether there has been a presentment and notice to him or not. (*s*)

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(135) Murray v. King, 5 Barn. & Cr. 165. In an action against the payee of a bill, on a bond from him and the drawer to pay the bill in a month after it became due, if the acceptor did not, defendant pleaded that the bill was not duly presented for payment, and secondly, that defendant had not due notice of its dishonor. Plaintiff replied, that the acceptance was a forgery; and defendant rejoined, that he did not know that, when the bill became due. Plaintiff demurred; and, on argument, the Court held the pleas bad; for, the condition was silent as to the presentment and notice; and, had it been intended that a neglect as to presentment or notice should have avoided the bond, the obligors should have taken care to have words to express that intention.

[(*q*) Seymour v. Van Slyck, 8 Wend. 403.]

[(*r*) Hunt v. Bridgham, 2 Pick. 581. Ellis as principal and Bridgham as surety, signed a note dated Dec. 9, 1802, payable to the plaintiff's testator on demand, attested by two witnesses. Ellis made a number of payments on the note, the last in 1815, the holder always allowing him further time, but not any fixed time, for making further payments. Ellis became insolvent in 1810. No suit was brought against Ellis, and no notice was given to Bridgham of non-payment until shortly before the commencement of this suit, more than 20 years after the date of the note. Wilde J. in giving the opinion of the court, says, "Upon the whole, it seems to be well settled, and as we think on the soundest principles of law and equity, that the delay of the creditor to proceed against the principal, without some binding contract to that effect, will not discharge the surety; unless the creditor is requested to proceed against the principal, and he neglects or refuses so to do; which according to the cases of Paine v. Packard, and King v. Baldwin, will be sufficient to discharge the surety. Most certainly this is going far enough in favor of sureties. If they will neglect to take any step for their own security, and the principal fails, they cannot complain of the creditor or of the law, if they suffer by their negligence."

[(*s*) Rightmere, the payee of a note, endorsed on it "For value received, I sell, assign, and guaranty the payment of the within note to

But it is held in other cases, that though the guarantor is not, like an endorser, always discharged by the neglect of presentment and notice, yet he is discharged if he is apparently injured by such neglect. (*t*)

John Allen or bearer." In an action by Allen against Rightmere, it was held that it was not necessary for the plaintiff to prove a demand and notice. Spencer C. J. delivered the opinion of the Court. "The defendant insists that he stands in the situation of an endorser merely; but such is not the fact. The undertaking here is not conditional; it is absolute that the maker shall pay the note when due, or that the defendant will himself pay it." Allen v. Rightmere, 20 Johns. R. 365.

Little, the payee of a note, by a written endorsement guarantied its payment in six months, and passed it to Kinsman & Cobb before it fell due. In an action against the guarantor by them, no demand was proved on the maker, but about eighteen months after the note fell due, Cobb sued the maker in his own name, but had been able to collect nothing. The defendant proved that the maker of the note had sufficient visible property to pay all his debts for a long time after the note fell due. It was held that the defendant was liable on his guaranty. Mellen C. J. delivered the opinion of the Court. "The guaranty in its terms, is *absolute*, that the note should be paid in six months. It was the duty of the defendant upon such an engagement to see that the maker paid the money within the time specified; and if he did not, to take notice of his neglect, and pay the amount himself." Cobb v. Little, 2 Greenleaf, 261.

On a note made by Phelps, payable to Williams, Oct. 1st, 1806, Granger endorsed and signed a guaranty, "for value received," that the maker "was and would continue to be until the day of payment, of sufficient responsibility to pay the note;" and a promise to the payee, if the note was not paid "by the 5th day of September, 1807, that he [Granger] would on that day pay the same to Williams." To an action on this contract, brought after Sept. 5th, 1807, Granger pleaded that Phelps was always able to pay the note until the date of the writ, that the defendant was a surety without funds, and that no notice was ever given to the defendant, or demand made on him previously to the date of the writ; and that no suit had ever been brought against Phelps. In the Court of Errors of Connecticut this plea was adjudged bad. Trumbull J. said, "This is not the case of a mere endorsement. No act was required on the part of Williams for obtaining the money of Phelps. He was merely bound to receive it, if offered. No special notice was necessary on that day in order to render Granger liable; for his engagement became immediately absolute on the failure of Phelps to pay. No special demand previous to the commencement of a suit was necessary." Williams v. Granger, 4 Day, 444.

S. P. Breed v. Hillhouse, 7 Conn. 523. See also Hall v. Rand, 8 Conn. 561.

Where the assignor of a note bound himself by the terms of the assignment of the note, "to stand good for the note until it was paid," it was held that he was not entitled to demand and notice. Bayley v. Hazard, 3 Yerger, 487.]

[(*t*) In Pennsylvania it has been decided that the guarantor of a note

Thus the guarantor of a note is held to be discharged by such neglect, if the maker is in good credit when the note falls due, and becomes insolvent before the guarantor is called on for payment. (*t*)

In some cases it has been held that though the guarantor of a note was liable without proof of presentment and notice, yet that the holder must use due diligence to collect the money of the maker, in order to charge the endorser. (*u*)

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was liable, although no notice of its non-payment was given to him, the maker and endorser being both insolvent when it became due, unless the guarantor could prove that he was prejudiced by the want of notice. Gibbs v. Cannon, 9 Serg. & Raw. 198. It was also held in this case that though notice to the guarantor, the defendant, was alleged in the declaration, it was not necessary for the plaintiff to prove it.

Oxford Bank v. Haynes, 8 Pick. 423. This was an action against Haynes as guarantor of a note for $1,000, signed by Smith as principal, and Anderton as surety, dated Oct. 9, 1823, and payable in sixty days. The words, "I guaranty the payment of the within note," were written on the back of it by the cashier of the Oxford Bank, and signed by Haynes, after which the bank discounted the note. About December 1, 1823, Smith paid $250 on the note. The note was not paid at maturity, and no notice of its non-payment was given to Haynes, until Oct. 7, 1824. Smith and Anderton were reputed to be men of property, and so continued until they failed, Smith about January 23, 1824, and Anderton in February following, each being possessed of visible and attachable property much exceeding the amount of this note, which was attached and levied on by other creditors. These facts appeared in a case stated, and the plaintiff was to be nonsuit, or the defendant defaulted according to the opinion of the Court. Parker C. J. in giving the opinion of the Court, considered the liability of a guarantor as different from that of a surety or of an endorser, and that in this case the defendants were discharged by the neglect of the plaintiffs, which had probably been prejudicial to the defendants. "It is clear," he said, "that both the promisors in the note were solvent when it (the note) became due, and that they had abundant property liable to attachment. But the plaintiffs, with the knowledge of their delinquency, lay by nine months, during which time their property was sacrificed, and all hopes of obtaining payment were by that means lost."

[(*u*) Foster v. Barney, 3 Verm. R. 60. In this case an endorsement was made on a note payable on demand, by the payee, twenty-three days after its date, in these words, "I hereby warrant the within note to be due and collectable." The plaintiff sued the maker in five or six days after it was transferred to him. The maker was discharged from jail by taking the poor debtor's oath. It was held that the endorser was not discharged by the want of presentment and notice, and that there was no such want of diligence in collecting the money as would discharge him. It was also held that the holder was not bound to attach the maker's real estate or take it on execution.

Where an assignment of a note not negotiable promised "to make

In Ohio it is held that in order to charge a guarantor of a note, a presentment to the maker, and notice to the guarantor, must be proved. (*v*)

If a partner after the dissolution of the partnership, without authority, endorse with the partnership name a note payable to the firm, and pass it to a third person in payment of his private debt, the endorsement not being binding on the partnership, the partner making it is not entitled to notice of the dishonor of the note, and the note is no discharge of his debt. (*w*)]

Payment of (136) part, or (137) a promise to pay after full

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the same good, if it was not;" it was held that this was a guaranty, and that the assignor was liable, without proving presentment and notice. All that was necessary on the part of the assignee was to use reasonable diligence to collect the money of the maker of the note. Wilson v. Mullen, 3 M'Cord, 236.

[(*v*) Green v. Dodge, 2 Hamm. R. 430.

In France the rights and obligations of a guarantor appear to be the same as those of an endorser. "Le donneur d'aval est tenu solidairement et par les même voies que les tireurs et endosseurs, sauf les consentions différentes des parties." Code de Com. Liv. 1. Tit. 8. Art. 142.]

[(*w*) Walker v. M'Micken, 9 Martin, 192.]

(136) Vaughan v. Fuller, Str. 1246. In an action against the endorser of a note, it being proved that the defendant had paid part, Lee C. J. held, that *that* made the proof of a demand upon the maker unnecessary. See Lundie v. Robertson, Horford v. Wilson, Gibbon v. Coggon, and Potter v. Rayworth, post.

(137) Rogers v. Stephens, 2 Term Rep. 713. In an action against the drawer of a foreign bill, an objection was taken that there was no protest: but it appearing that the defendant had no effects in the hands of the drawees when the bill was drawn or afterwards, and that, on being pressed for payment by the plaintiff's agent after the bill was dishonored, he had said, it must be paid; Lord Kenyon thought a protest or notice unnecessary, and directed the jury to find for the plaintiff, which they did: a rule was afterwards granted, to show cause why there should not be a new trial, and it was stated *then*, and upon the showing cause, that the defendant had really been prejudiced by the want of notice, to the amount of the bill; that he had advanced money to one Calvert to the amount before the bill was drawn; that Calvert desired him to draw on the drawees as Calvert's agents; that he did so, on a supposition that Calvert had effects in their hands; that he afterwards settled with Calvert, and upon a reliance that the bill was paid, delivered him up effects to more than the value of the bill; and that Calvert was since insolvent; that the defendant was prepared with evidence to this effect, but, that Lord Kenyon delivered it as his opinion, that it did not make a protest or notice necessary; Lord Kenyon did not recollect that this evidence was offered, but he and all the court thought it answered by the defendant's admission that the bill must be paid; because, that was an admission that the plaintiff had a right to

notice of the default, sufficiently evinces that the party could not have sued on paying the bill or note, and consequently that he cannot insist on want of notice, or of a neglect to pre-

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resort to him upon the bill, and that he had received no damage by the want of notice, and was a promise to pay. The rule was discharged

Anson v. Bailey, Bull. N. P., 276. The endorsee of a note presented it for payment, but the maker pretended that the payee had promised not to endorse it over without acquainting him, and so put off the endorsee from time to time for three weeks; at the end of that period the endorsee wrote twice to the payee, stating what he had done, and the maker's excuse; the payee answered, that when he came to town he would set the matter right; and upon an action by the endorsee against the payee, the jury found for the plaintiff, though the maker became bankrupt before the second letter was written, and though he continued solvent for three weeks after the note was due.

Wilkes v. Jacks, Peake, 202. In an action against Jacks as endorser of a bill drawn by Vaughan on Eustace and Holland, it appeared that notice had not been given to the defendant, upon which the plaintiff offered to show that Vaughan had no effects in the hands of Eustace and Holland; sed per Lord Kenyon, "That circumstance will not avail plaintiff; the rule extends only to actions brought against the drawer; the endorser is in all cases entitled to notice, for he has no concern with the accounts between the drawer and the drawee." The plaintiff then proved a letter from the defendant acknowledging the debt, and promising to pay, and upon *that* he had a verdict.

[In a suit against the endorser of a note, no demand on the maker was shown, but a promise to pay by the endorser after he was notified and called on for payment, and circumstances which tended to show his knowledge of the neglect to make a presentment, were proved at the trial. Parker C. J. instructed the jury "that if the defendant when he made the promise to pay knew that no demand had been made on the maker," they should find for the plaintiff; which they did. Motion for a new trial. "Per Curiam. A promise of this sort to be binding must be made with a knowledge of the circumstances which operate to discharge the party; and the jury in this case have decided that there was such knowledge." Judgment on the verdict. Hopkins v. Liswell, 12 Mass. R. 52.

Where two months after a bill was due, it was produced to the endorser, and inquiries made as to the drawer and acceptor, upon which he offered to pay 10*s.* on the pound. Held that this dispensed with proof of notice of dishonor of the bill. Dixon v. Elliott, 2 C. & P. 437.

See also Pierson v. Hooker, 3 Johns. R. 68; Duryee v. Dennison, 5 Johns. R. 248; Donaldson v. Means, 4 Dall. 109; Ladd v. Kenney, 2 N. Hamp. R. 340; Beck v. Thompson, 4 Har. & John. 531; Handage v. Creighton, 2 Car. & P. 406; Gardner v. Jones, 2 Murphy, 429.

In an action against an endorser of a note who had not been duly notified of non-payment, it was proved that after the note became due, he had admitted his liability upon the note, and offered to pay it. At the trial the defendant's counsel moved that the plaintiff should be nonsuited unless he further proved that "when the defendant made his promise he knew that he was discharged in law by the insufficiency of the notice." The judge overruled the objection, and verdict for the

sent; a payment or promise without notice of the default does (138) not.

[A new promise to pay may be proved by parol evidence, where there has been no valid notice. (*x*)

Where an endorser, on being called on to pay a note,

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plaintiff subject to the opinion of the Court. Spencer C. J. delivered the opinion of the Court. "It must be shown by the plaintiff affirmatively and clearly, that the defendant knew, when he made the subsequent promise, that he had not received regular notice. An endorser may believe that due notice has been given, inasmuch as notices need not be personally served, and under an ignorance of the facts consider himself liable when he is not." Nonsuit. Trimble v. Thorn, 16 Johns. R. 152.

In a similar case, Story J. said, "A promise to pay with a full knowledge of all the facts, is binding upon the endorser, although he might otherwise be discharged. But if he promise in ignorance of material facts affecting his rights, it is not a waiver of those rights." Martin v. Winslow, 2 Mason, 241.

Where the drawer of a bill which had been dishonored, promised to make an arrangement which should be satisfactory to the holder, it was held that he was not liable without proof of presentment and notice, or that he made the promise with a knowledge that he had not been duly charged by presentment and notice. Jones v. Savage, 6 Wend. 658. It was held in the same case that the drawer's including the demand of the holders of the bill in an account of his creditors, on his applying for an insolvent's discharge, was not sufficient to charge him without such proof.

See also Crain v. Colwell, 8 Johns. R. 299; Hussey v. Freeman, 10 Mass. R. 84; Fotheringham v. Price, 1 Bay, 291; Thornton v. Wyman, 12 Wheat. 183; Hennen v. Desbois, 8 Martin, 147; Otis v. Hussey, 3 N. H. R. 346; Andrews v. Baggs, 1 Minor, 173.

But in Walker v. Laverty, 6 Munf. 487, it appears to be held that the promise of the drawer of a bill not duly notified, to pay it, was binding on him, whether he knew the facts as to the laches of the holder, or not.

In Kentucky a promise to pay by an endorser of a bill who had not been duly notified, was held to be void for want of consideration. Lawrence v. Rolston, 3 Bibb, 102.

In Connecticut, where an endorser of a note who had been discharged by the laches of the holder in not bringing a suit against the maker, afterwards asked indulgence for the maker, and promised verbally to pay; it was held that he was not bound by the promise. Peabody v. Harvey, 4 Conn. R. 119.]

(138) Blesard v. Hirst and another, Burr. 2670. The defendants endorsed a bill to the plaintiff, and he endorsed it over; his endorsee presented it for acceptance a month before it was due, and acceptance was refused; it was afterwards presented for payment, and payment was refused, of which notice was given to the defendants, but they had no notice of the refusal to accept. The drawer was a bankrupt before the bill was due, but he continued in credit three weeks after the presentment for acceptance. Three days after the notice, one of the de-

says that he is legally exonerated or discharged as endorser, but that he does not wish to take any advantage of it, and promises to pay the note, he is bound by the promise, without further evidence of his knowledge that he has not been regularly charged. But even in this case it may be competent for the endorser to prove that he made the promise under a misapprehension of the facts. (*y*)

A promise to pay by a party to a bill or note, who is discharged by the laches of the holder, must be explicit and deliberately made in order to be binding. (*z*)

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fendants called on the plaintiff at Bradford, on his way to Leeds, and said he would take up the bill as he returned; but on his return he said he was advised he was not bound to do it, upon which this action was brought; and on a case reserved the Court held, that though the holder might not have been obliged to present the bill for acceptance, yet, as he did so present it, he ought to have given notice of the refusal, and that by not doing so he had taken the risk upon himself; and notwithstanding the promise of one of them, the defendants had judgment.

Goodall v. Dolley, 1 Term Rep. 712. A bill drawn in favor of the defendant, payable the 11th of January, 1787, was presented for acceptance by the plaintiffs the 8th of November, 1786, when acceptance was refused; they gave no notice to the defendant till the 6th of January, and then did not say when the bill was presented; upon which the defendant proposed paying by instalments, but the plaintiffs rejected that offer, and brought this action. Heath J. thought the defendant discharged for want of notice, and that his offer to pay, being made under an ignorance of the circumstances, was not binding; and the jury, under his direction, found a verdict for the defendant. Upon cause shown against a rule for a new trial, the Court thought the direction and verdict right, and discharged the rule.

See Lundie v. Roberton, Horford v. Wilson, Gibbon v. Coggon, and Potter v. Rayworth, post.

[(*x*) Debuyse v. Moliere, 15 Martin, 318. This point is taken for granted in other cases.]

[(*y*) Leonard v. Gary, 10 Wend. 504.]

[(*z*) Coffin, the endorser of a bill, had not been notified of its non-acceptance. When called on for payment by the agent of the holder, who had the protest for non-payment with him, Coffin said that this was the first notice he had of the bill's being protested for non-acceptance; that he was not prepared to meet the payment; but that in a few days he would look round, and make preparations for the settlement of it; and other expressions to the same effect. It was held that Coffin was not liable. Sedgwick J. delivered the opinion of the Court.] "What a man says under the surprise of a sudden and unexpected demand for money, ought to be construed with a good deal of strictness. We are all satisfied that what the defendant said of paying money, from the payment of which he was discharged by law, ought not to bind him." May v. Coffin, 4 Mass. R. 341.

The endorser of a draft's saying, after hearing of its dishonor, of which he was not seasonably notified, that if the draft was presented to him duly protested he would have to pay it, is not a promise to pay the bill which will render him liable. It is the mere expression of an opinion. (*a*)

Even a confession of judgment, by a party to a bill or note, is not conclusive evidence of the waiver of the right to presentment and notice (*b*); nor is his taking security from a prior party (*b*); nor his using exertions to obtain payment from a prior party (*c*); nor his offering to endorse a new note, for the same amount as the dishonored one. (*d*)

An endorser of several bills, on one of which he was chargeable, speaking generally of them, to a person not a party, said, "*that he would take care of the bills, or see them paid.*" It was held, whichever of the expressions he used, that he did not make himself liable on the other bills, of whose dishonor he had not been duly notified. Van Ness J, delivered the opinion of the Court. "A subsequent promise to pay under a knowledge of the fact of want of notice, ought to be made out clearly and unequivocally. It would be dangerous to fix an endorser without notice, and perhaps without knowledge of the *laches* of the holder, upon such loose conversation with a third person." Miller v. Hackley, 5 Johns. R. 375.

The endorser of a note, on the maker of which there had been no regular demand, being sued, a short time before the trial said that "he knew of no defence." Spencer J. delivered the opinion of the Court: "Here there is no promise. The defendant knew of no defence. This is extremely slight; and by no means waives any objection which the law puts into into his hands." Griffin v. Goff, 12 Johns. R. 423.]

[(*a*) Penn v. Pousseirat, 14 Martin, 541.]

[(*b*) The endorser of a note, where there had been no demand on the maker, being sued, at first confessed judgment, the makers of the note after the action brought having given him security, which however turned out to be worthless; but the judgment was afterwards opened, and he let into a defence. It was held that the confession of judgment, though evidence, was not conclusive evidence of an acknowledgment of liability; and that if the defendant made it being unacquainted with his rights, or through imposition, it did not render him liable; and "that taking the indemnity, being after action brought, if taken under the impression of a regular demand and notice, and the endorser believing himself to be liable, was no waiver" of his rights. Richter v. Selin, 8 Serg. & Raw. 425.

See also Warder v. Tucker, 7 Mass. R. 449.

The endorser of a note, after it fell due, believing himself liable upon it, took an assignment of a chose in action from the maker, and also received some money, to indemnify him from his endorsement. It was held in an action against the endorser, that the plaintiff was not excused from proving a demand and notice. Tower v. Durell, 9 Mass. R. 332.]

[(*c*) Hussey v. Freeman, 10 Mass. R. 84.]

[(*d*) Laporte v. Landry, 17 Martin, 359.]

And if an endorser of a note who has not been charged by due presentment and notice, not knowing the facts, give his own note in discharge of the dishonored one, the new note will not be binding on him in the hands of the payee for want of consideration. (*e*)

So where an endorser of a note, who was discharged by the laches of the holder, afterwards paid him the money, under an ignorance of the facts which discharged him, it was held that he might recover the money back. (*f*)

Where an endorser of a protested bill, after having had sufficient opportunity to ascertain the circumstances of the presentment, protest, and notice, promised the holder to pay it, received the bill from the holder, and proved it in his own name against the estate of the drawee, who had failed, and received a dividend upon it, and retained the bill. It was held, that he was liable on this promise, unless he could prove that it was made under a mistake of the facts. (*g*)

So where the endorser of a protested bill gives his bond for the payment of the amount, if he would be relieved from payment of the bond in equity on the ground of want of consideration, the burden of proof is on him, to show that the proper steps have not been taken to charge him as endorser. (*h*)

[(*e*) Croghers v. Wolf, 2 Monroe, 88.]

[(*f*) Cross left a note in the Salem Bank for collection, on which Garland was endorser. The note fell due while Garland was absent from Salem, his place of residence; but there was no sufficient demand or notice. On his return to Salem he paid the money, which the bank passed to the credit of Cross. Three days afterwards Garland having ascertained the facts, reclaimed the money of the bank, it still remaining there, not paid over to Cross, forbade their paying it over to any person, gave notice that he had paid it by mistake, and tendered the note to the cashier and officers of the bank. The bank afterwards paid over the money to Cross. And Garland brought a suit against the bank to recover back the money paid. Sewall J. charged the jury "that the defendants were not entitled to retain the money paid, unless the payment had been made by the plaintiff voluntarily, and with a knowledge of all the circumstances, and an intended waiver of his legal advantage and discharge." Verdict for the plaintiff; and, on motion for a new trial, judgment on the verdict. Garland v. Salem Bank, 7 Mass. R. 408.

In Glen on Bills, 187, is a similar case, where a party to a bill discharged by the laches of the holder, recovered back the amount paid by him.]

[(*g*) Martin v. Ingersoll, 8 Pick. 1.]

[(*h*) Mills v. Rouse, 2 Litt. 203.]

A conditional promise to pay, or an offer to pay in a certain manner, is not binding as a waiver of the rights acquired by the neglect of the holder, if the terms be not accepted. (*i*)

It has been held in some cases that a promise to pay made by a party knowing the facts which discharge his liability, but ignorant of the law, would not render him liable. (*k*)

But where the endorser of a bill four years after its dishonor gave the holder a bond, which included the amount of the bill, and three years after executed a deed of trust of land to secure the debt, the Court refused to enjoin the sale of the land by the trustee, on the ground that due notice of the dishonor of the bill had not been given the endorser. (*l*)

If before a bill or note falls due, the endorser agrees to pay

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[(*i*) The endorser of a note who had not been duly notified, offered the holder to take up the note, and give his own note payable in a year; but the holder requiring an endorser on the new note, nothing was done. In a suit by the holder against the endorser, it was held that the endorser was not liable. Thompson C. J., giving the opinion of the Court, said, "The promise or offer of the defendant was qualified or conditional, and having been rejected by the plaintiff, was not binding on the defendant." Agan v. M'Manus, 11 Johns. R. 180.

See also Sice v. Cunningham, 1 Cowen, 397; and Crain v. Colwell, 8 Johns. R. 299.]

[(*k*) In an action against the endorser of a bill, it appeared that he had not been duly notified of its non-acceptance. After receiving notice of the bill's being protested for non-acceptance and non-payment, he wrote a reply to the holders in which he expressed hopes of recovering property of the drawers sufficient to indemnify the holders, acknowledged his accountability to them, and engaged to do all that was in his power to make payment. Curia. "Although the defendant, when he first received notice from the plaintiffs of the protest of the bill, considered himself as liable by law to pay the plaintiffs the amount of it, yet his ignorance of the law shall not bind him to fulfil an engagement made through mistake of the law. Nonsuit. Wartler v. Tucker, 7 Mass. R. 449.

See also May v. Coffin, supra.

In a case of the same kind Parker J. in delivering the opinion of the Court, said, "The facts reported do not show any direct promise to pay; and even if they did, it is well settled that a promise under such circumstances as show an ignorance that the party was legally discharged, is without consideration and void." Freeman v. Boynton, 7 Mass. R. 483.

In Ladd v. Kenney, 2 N. Hamp. R. 340, the Court seem to think that a promise to pay by an endorser, who is discharged by the laches of the holder, made with a knowledge of all the facts, but under a mistake of the law, would render him liable.]

[(*l*) Pate v. M'Clure, 4 Rand. R. 164.

it, in consideration of time to be given him, this promise renders a demand and notice unnecessary. (*m*)

And it has been held, that an endorser of a note's saying, before it became due, he would take it up, if it were not paid by any other party to it, was a waiver of his right to notice. (*n*)

Where the maker of a note is not in a situation to pay it, and before it falls due the endorser proposes to the holder to pay it in a certain manner, and pending the negotiation for this purpose the note becomes due, the endorser thereby waives his right to insist on demand and notice. (*o*)

Where the endorsers of a note applied to a bank to get notes discounted for the makers, and stated in the letter that they, the endorsers, would attend to the renewals and take care of the notes of the makers, and directed that the notices addressed to the makers should be directed to their, the endorsers' care, and sent to them, and notice was sent accordingly in regard to the note in suit; it was held that this was a

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[(*m*) On the day before a note became due, a demand was made on the maker, and notice given to the endorser, and the latter then agreed with the holder to pay the note in consideration of time being given him. It was held that this promise was "a waiver of strict demand and notice." Norton v. Lewis, 2 Conn. R. 478.]

[(*n*) Boyd v. Cleveland, 4 Pick. 525. This was an action against the defendant as endorser of a note. The defendant endorsed the note and delivered it to the plaintiffs at New York in payment on a purchase of flour. At the time one of the plaintiffs observed to him, that he had no confidence in any of the other parties to the note, and did not know them, and should look wholly to the defendant. The defendant replied, that he should be in New York when the note would become due, and would then take it up, if it were not paid by any other party to it. It was held, that this was a waiver of a right to notice of the dishonor of the note, and that an attempt on the part of the plaintiffs to give such notice did not affect the question.]

[(*o*) In an action against the endorser of a note it appeared, that before the note became due, he informed the plaintiff's attorney who held the note, that one of the makers was out of the State, and that the other had absconded; but he said that he was secured for his responsibility, and requested time to pay the note; and offered to give a new note with an endorser, to which the plaintiff's attorney assented, and pending the negotiation for that purpose the note fell due, and no demand was attempted to be made or notice given. It was held that the endorser was liable on his endorsement. Leffingwell v. White, 1 Johns. Cas. 99.]

waiver of presentment and notice, or at least evidence from which a jury might infer such a waiver. (*p*)

Where a note was payable at *ten days' notice*, and notice was given, and before the expiration of the ten days an endorser promised to pay it, telling the holder to give himself no uneasiness about it, he would see him paid; it was held, that the endorser could not set up as a defence the want of a sufficient demand or notice. (*q*)]

The drawer is not entitled to notice of non-payment by the acceptor, if the bill were accepted for the drawer's accommodation. (139)

And if the drawer make the bill payable at his own house, this circumstance is evidence that the acceptance was for his accommodation. (139)

Proof that the drawer had no effects in the hands of the drawee from the time the bill was drawn until it became payable, is sufficient (140), at least primâ facie, to show, that the

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[(*p*) Taunton Bank v. Richardson, 5 Pick. 436.]

[(*q*) Leonard v. Gray, 10 Wend. 504.]

(139) Sharp v. Bailey, 9 Barn. & Cr. 44. In an action against the drawer of a bill, it appeared that the bill was in his handwriting, and that he made it payable at his own house. There being no proof of notice to defendants of its dishonor by the acceptor, Littledale J. thought that the making the bill payable at his own house was evidence that it was an accommodation acceptance, in which case the notice would not have been necessary, and he left that question to the jury, who found for the plaintiff: and on motion for a new trial Lord Tenterden said, he could not understand why plaintiff should make the bill payable at his own house, unless he was to provide for it at maturity. He thought the point correctly presented to the jury, and that there was no reason to find fault with their verdict. Rule refused.

(140) Rogers v. Stephens, antè, p. 294. note (137).

Bickerdike and another, assignees of Reichard, v. Bollman, 1 Term. Rep. 405. The only question upon a case reserved was, whether a bill the bankrupt had drawn in favor of the petitioning creditor, upon a man, who then and from that time till the bill became due was one of the bankrupt's creditors, had discharged so much of the petitioning creditor's debt, no notice having been given of its dishonor to the bankrupt? and the Court, after argument, were of opinion it had not; because, the reason why notice is in general necessary, is that the drawer may without delay withdraw his effects from the drawee, and that no injury may happen to him from the want of notice; but, where the drawer has no effects in the hands of the drawee, he cannot be injured, and is not entitled to any notice.

Goodall v. Dolley, antè, p. 297. note (138). In this case, upon the application for a new trial, the plaintiff's counsel offered an affidavit

drawer would not be entitled to bring an action on paying the bill, and has therefore no right to insist on the want of notice, &c. and it (141) has been doubted whether the drawer would be at liberty to show the contrary.

But that doubt seems to be unfounded. (142)

[If the holder of a bill claim to be excused from proving notice to the drawer, on the ground of want of funds in the drawee's hands, the burden of proof is on the holder. (*r*)]

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that the drawer had no effects in the hands of the drawee; but the Court thought *that* made no difference, the action being brought against the payee; but by Buller J., "Had the action been against the drawer, I should have been willing to let in the affidavit; that would be like the case of Bickerdike v. Bollman; if the drawer has no effects in the hands of the drawee, he cannot be injured by want of notice."

Legge v. Thorpe, 12 East's Rep. 171. Action by an endorsee against the drawer of a foreign bill, drawn upon C. B. Wyatt, payable one month after sight; acceptance had been refused. The declaration negatived effects in the hands of the drawee, or any consideration for the bill. It appeared at the trial that the defendant had no effects in Wyatt's hands, and that the latter had therefore refused acceptance; but that Wyatt was one of the executors of Weeks, and that Weeks's executors had desired the defendant to employ the payee of this bill to do some carpenter's work on Weeks's property, and the defendant therefore drew this bill on Wyatt to settle with the payee. Wyatt denied that he had assets to pay the bill. The only question was, whether a protest for non-acceptance were necessary. Lord Ellenborough thought not, and a verdict was given for the plaintiff, but the point was reserved; and on a rule nisi for a nonsuit, and cause shown, the whole Court held that this case was governed by those of Bickerdike v. Bollman, and Rogers v. Stevens, and discharged the rule.

[See also Read v. Wilkinson, 2 Wash. C. C. R. 514; —— v. Stanton, 1 Hayw. R. 271; Baxter v. Graves, 2 Marsh. 152.

Where the drawer had no funds in the hands of the drawee, it was held that notice to the drawer of non-payment was not necessary, in order to charge him, even though the bill had been accepted by the drawee. Hoffman v. Smith, 1 Cain. R. 157.]

(141) In Rogers v. Stephens, ante, page 294. note (137), Mr. J. Ashhurst said, "Admitting the proof offered had been given, I do not think it clear it would take the case out of the common rule; for, the law being now established, that notice to the drawer of a non-acceptance is not necessary where he has no effects in the hands of the drawee, when the plaintiff found the drawees of this bill had none of the defendant's effects in their hands, he knew he was not bound by law to give the defendant notice; he was not bound to take cognizance of any private transaction between the drawer and a third person not appearing on the face of the bill."

(142) Rucker v. Hiller, infra. Ex parte Heath, post. Correy v. Scott, post. Robins v. Gibson, post.

[(*r*) Barber v. Graves, 2 Marsh. 152.

The law of France takes a little different view of the effect of want

It is no excuse for not giving notice to the drawer, that he had no effects in the drawee's hands when the bill was drawn or became due, if he had effects on their way to the drawee. (143)

Unless the drawer get back those effects, and would stand indebted in the amount to the drawee, if the drawee paid the bill.

[So if the drawer of a bill, who has no funds in the hands of the acceptor at the time of its acceptance, intercepts funds which the acceptor expects to receive and pay the bill with, in consequence of which the acceptor refuses payment, the drawer is chargeable without notice. (*s*)

So if the drawer of a bill withdraw his funds from the hands of the drawee, for the purpose of preventing payment of the bill by the drawee, neither presentment nor notice is necessary in order to charge him. (*t*)

So if the drawer of a bill forbids the drawee's paying it, the drawer will be chargeable without presentment or notice. (*u*)

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of funds,—as it regards the rights of the holder of a bill against the drawer. "Soit qu'il ait ou non acceptation, le tireur seul est tenu de prouver, en case de dénégation, que ceux sur qui la lettre était tirée, avaient provision à l'échéance: sinon il est tenu de la garantie, quoique la protet ait été fait apres les delais fixés. Cod. de Com. L. 1. T. 8. Art. 117. Il y a provision, si, à l'chéance de la lettre de change celui sur qui elle est fournie est redevable au tireur, ou à celui pour compte de qui elle est tirée, d'une somme au moins égale au montant de la lettre de change. Id. Art. 116.]

(143) Rucker v. Hiller, 3 Campb. 217. 16 East, 43. In an action by the endorsee of a bill against the drawer, it appeared that the drawer had no effects in the drawee's hands, but that he had shipped goods, which were on their way to the drawee: the drawee refused to accept, but no notice thereof was given to the drawer; and it was insisted, that as the drawee had not received effects, defendant was not entitled to notice: Lord Ellenborough thought otherwise, as the drawer was in expectation that the goods he had shipped would reach the drawee; non-suit: on motion to set aside the nonsuit, it did not appear but that the drawer might have been prejudiced by want of notice, and the rule was refused. See n. (146.)

[(*s*) Lillie v. Miller, 2 Nott & M'Cord, 257, note.]

[(*t*) Valk v. Simmons, 3 Mason, 113.]

[(*u*) Bird v. M'Dowell, 2 Nott & M'Cord, 254.

But it has been held that where the drawer of a check draws all his funds out of the drawee's hands, between the time of drawing the check and the time when it ought to be presented, the holder is not excused from making presentment and giving notice in order to charge the drawer. Edwards v. Moses, 2 Nott & M'Cord, 433. But since

If a check be drawn on a bank for the accommodation of the payee, payable at a future day, with the expectation on the part of the drawer, that the payee would provide funds for its payment, the drawer cannot be charged without proof of presentment and notice, though neither he nor the payee had deposited funds at the bank to meet the check. (*v*)]

It is no excuse for not giving notice to the drawer, that he had no effects in the drawee's hands, if the drawer would be entitled on taking up the bill to sue either the acceptor (144);

Or any other party (145);

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the drawer of the check has obtained the money, which ought to have been applied to the payment of the check, ought he not to be responsible for it? Is he not guilty of a breach of faith in withdrawing it?

[(*v*) Brown v. Lusk, 4 Yerger, 210; Cathell v. Goodwin, 1 Har. & Gill, 468.

Where the facts as to the grounds of the drawer's expectation of funds in the hands of the drawee are admitted, or undeniable, the question whether he have ground for such expectation is held, in Maryland to be one of law. Cathell v. Goodwin, 1 Har. & Gill, 468.]

(144) Ex parte Heath, 2 Ves. & Beam. 240. 2 Rose, 141. Upon application by the endorsee of a bill to be allowed to prove against the drawer, it was urged as an excuse for not giving notice of dishonor to the drawer, that he had no effects in the acceptor's hands, and was therefore not entitled to notice: it was answered, that there were various transactions between the drawer and acceptor, and that the result of the transactions was accommodation to the acceptor; and, per Lord Eldon "if a bill were accepted for the accommodation of the drawer, and there were nothing but that bill between them, notice would not be necessary, the drawer being, as between him and the acceptor, first liable; but if bills were drawn for the accommodation of the acceptor, the transaction being for his benefit, there must be notice without effects; and if in the result of various dealings, the surplus of accommodation is on his side, he is, with regard to the drawer, in the situation of an acceptor having effects: and the failure to give notice may be equally detrimental." He accordingly directed an inquiry, but noticed, that upon the complication which existed in the case, it was upon the petitioner, the endorsee, to prove there was not what the law calls "effects."

(145) Corey v. Scott, 3 Barn. & Ald. 619. Endorsee against drawer, on bill drawn by defendant on Gordon, and accepted by him, payable to defendant, endorsed by him to Lough, and by Lough to plaintiff: no evidence of notice to defendant; excuse that defendant had no effects in Gordon's hands: answer, that Lough was to provide for the payment, and that both Gordon and defendant, Scott, lent their names to accommodate him. Abbott C. J. thought this rebutted the excuse from want of effects; and nonsuit: and on rule nisi to enter verdict for plaintiff, and cause shown, the Court were clear defendant was entitled to notice; for, had he taken up the bill he might certainly have sued Lough, if not Gordon; he was, therefore, in a situation in which want

As, if the bill were drawn for the accommodation of the acceptor (144);

Or drawn and accepted for the accommodation of the payee, or a subsequent endorsee. (145)

It is no excuse for not giving notice to the drawer that he had, in fact, no funds in the hands of the drawee, if he had made a provision to have such funds there, and might reasonably expect they were there. (146)

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of notice might have hurt him; and if so, he was entitled to notice: rule discharged.

Norton v. Pickering, 8 Barn. & Cr. 610. In an action against the drawer of a bill, no notice of the dishonor had been given to the defendant, but plaintiff proved that defendant had no effects in the hands of the drawee: it appearing, however, that the drawer and acceptor had merely lent their names to the first endorsee, and that the drawer would therefore have been entitled to a remedy over against the first endorsee, had he, the drawer, paid the bill, Bayley J. held the want of notice not excused, and nonsuited the plaintiff; and on motion to enter a verdict for plaintiff, the Court thought the nonsuit right, and refused a rule.

[Lafitte v. Slatter, 4 M. & P. 457, S. C. 6 Bing. 623, is a very similar case, in which it was also held that the acceptor's informing the drawer before the bill became due that he would not provide for it, did not excuse want of notice to the drawer.]

(146) Robins v. Gibson, 3 Campb. 334. To excuse want of notice to the drawer of a foreign bill, the drawee proved that he had in fact no funds of the drawer in his hands from the time the bill was given till its becoming due: but he said the bill was drawn on a cargo shipped by the drawer for England, that the cargo was in the hands of a broker for sale, and when it was sold, the proceeds were to be paid to him to answer the bill; and Lord Ellenborough held, that under these circumstances, as the bill was drawn on expected funds, the drawer was entitled to notice: plaintiff then proved notice, and had a verdict. And see 1 Bos. & Pull. 655; and 12 East, 175. [See also Austin v. Rodman, 1 Hawks, 194.]

[In an action against the drawers of a bill protested for non-acceptance, it was proved that the drawees had no funds in their hands when this bill was presented, having accepted bills previously drawn by the defendants to a greater amount than the funds in their hands; and that the want of funds arose from a fall in the price of cotton shipped by the drawers to the drawees. It was held that the action could not be maintained without proving seasonable presentment and sufficient notice of the dishonor to the drawers. Spencer C. J. delivered the opinion of the Court. "It has repeatedly been decided, that where there are any funds in the hands of the drawee, so that the drawer has a right to expect the bill will be paid, or where there are not any funds, yet, if the bill was drawn under such circumstances as induced the drawer to entertain a reasonable expectation that the bill would be accepted and paid, the person so drawing it is entitled to notice; and *a fortiori* he is entitled to have the bill duly presented." But judgment was given for

As, if he drew upon a cargo he shipped for this kingdom, and such cargo were in the hands of a broker, who was to pay the proceeds to the drawee. (146)

If the drawer had effects in the hands of the drawee at the time when the bill was drawn, it has been held he (147) is en-

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the plaintiff in this case, because the Court thought that there had been no laches. Robinson v. Ames, 20 Johns. R. 146.

See also French v. Bank of Columbia, 4 Cranch, 141.

Where the drawer had funds in the hands of the drawee at the time of drawing the bill, but those funds were attached in the hands of the drawee by the trustee process of Massachusetts, before the bill was presented for acceptance, it was held that the drawer could not be charged without due notice of the non-acceptance being proved. Stanton v. Blossom, 14 Mass. R. 116.

It has been laid down without qualification in some American cases, that though there are no funds in the hands of the drawee of a bill, yet if the bill were drawn under such circumstances as might induce the drawer to entertain a reasonable expectation that the bill would be accepted and paid, he is entitled to notice. See Robinson v. Ames, supra, and Campbell v. Pettengill, 7 Greenl. 126. But ought he to be entitled to be discharged by the want of presentment and notice in such case, unless he can show that he has been injured by the neglect? The general reason that a drawer is entitled to notice, is that he may be injured if the drawee does not apply the funds of the drawer to the payment of the bill which he draws. If the drawee have no funds, it is evident that in most cases the drawer is not injured by the dishonor of his bill. But suppose the drawee has agreed to accept for the drawer's accommodation, having no funds—here the drawer has a reasonable ground for expecting his bill will be accepted and paid, but its dishonor does not seem likely to injure him (except so far as it may make him liable to re-exchange or damages.) It may, by possibility injure him, as if he should make advances or remittances to the drawee under the impression that the bill had been honored. But such a case would be unlikely, and it seems reasonable to consider the drawer who has no funds as *prima facie* liable without notice, and to throw on him the burden of proving in such a case that he was injured by the want of notice.]

(147) Orr v. Maginnis, 7 East, 359. In an action by the payees against the drawer of a foreign bill, payable at ninety days after sight, the declaration averred presentment for acceptance and refusal, presentment for payment and refusal, and protest for non-payment; it then averred, that at the time of making the bill, and from thence until presentment for payment, the defendant had no effects in the hands of the drawees. At the trial it appeared, that at the time of *drawing* the bill, the defendant had effects in the hands of the drawees, but to what amount did not appear: but that when the bill was presented for acceptance, and thence until presentment for payment, he had not any. The bill was only noted for non-acceptance, but was protested for non-payment: no notice of non-acceptance was given to the defendant. The plaintiffs had paid the amount of the bill to an endorsee. They were nonsuited for want of proving protest for, and notice of, non-ac-

titled to notice of non-acceptance; although at the time when the bill was presented for acceptance, and from thence until presentment for payment, he had not any.

So, if he had effects in the hands of the drawee, when the bill was presented for acceptance, it has been held that he will be entitled to notice of non-acceptance (148), although he were indebted to the drawee greatly beyond the amount of such effects.

Notice to the drawer is not necessary, though he had supplied the drawee with goods, if those goods were supplied upon a credit which had not expired, and the drawer could entertain no reasonable expectation that the drawee would pay the bill (149);

And could have no remedy against him for not doing so. (149)

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ceptance. On motion to set aside the nonsuit, Bickerdike and Bollman, and other cases, were cited to show that no notice, and therefore no protest, was necessary. But Lord Ellenborough said, that that case went on the ground that there were no effects in the hands of the drawee at the time when the bill was drawn; and the other cases followed on the same ground; but that no case had extended the exemption to cases where the drawee had effects of the drawer's in his hands at the time when the bill was drawn, though the balance might vary afterwards, and be turned into the opposite scale. Rule refused.

(148) Blackhan v. Doren, 2 Campb. N. P. C. 503. This was an action against the drawer of a bill for 250*l.* payable after sight; of which acceptance had been refused: and to excuse the want of notice of non-acceptance, it was proved that when the bill was presented, though the drawer had effects in the hands of the drawees to the amount of 1500*l.*, yet that he owed them 10,000*l.* or 11,000*l.*, and that they had appropriated the effects to go in satisfaction of this debt: this appropriation, however, was without the defendant's privity. Lord Ellenborough held, that a notice was necessary, and nonsuited the plaintiff.

(149) Claridge v. Dalton, 4 M. & S. 226. Defendant drew upon Pickford for 300*l.* at two months after date. The date was 29th June. Defendant had supplied Pickford with goods to the amount of 200*l.*, and between June and September he supplied him with 70*l.* worth more; but, according to their course of dealing, the goods were to be paid for by acceptance at the end of the year. Defendant, being sued by an endorsee, insisted upon want of notice: but on point saved, the Court held, that under the circumstances, as he had no ground for expecting that Pickford would pay the bill, and as notice could have done him no service, he had no right to object to the want of it: and rule nisi for nonsuit discharged.

The drawer is entitled to notice, though he had no effects in the hands of the drawee at the time the bill was drawn, or at the time it was accepted, if he had before it became due. (150) (151)

And it has been held that the drawer is entitled to notice, if he has any effects in the hands of the drawee at the time the bill becomes due. (151)

Though such effects be not equal to the sum in the bill. (151)

And if there be several bills in the hands of the same owner, becoming due on different days, the drawer is entitled to notice as to each, though the effects in the drawee's hands be not equal to any of the bills. (151)

And a neglect to give notice will discharge the drawer as to all. (151)

It is no excuse for not giving notice to the drawer, that the bill, before it became due, had been accidentally destroyed, and that he had refused to give a new bill according to 9 & 10 W. 3. c. 17. (151)

The drawee's insolvency is no excuse for not giving notice. (151)

Though notice to the drawer may be dispensed with, where it is shown he had no effects in the hands of the drawee, nor

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(150) Hammond v. Dufresne, 3 Campb. 145. Action against drawer on bill for 30*l.*: proof, that at the time the bill was drawn and accepted, defendant had no effects in the hands of the drawees; but it appearing, that before the bill became due he paid 400*l.* for them, Lord Ellenborough held want of notice not excused: and nonsuit.

(151) Thackray v. Blackett, 3 Campb. 164. Plaintiff had two bills for 183*l.* each, drawn by defendant on Preston and Co., due the 13th and 20th of April, 1810; they were accepted, but before they became due, they were, by mistake, destroyed by Preston and Co.: plaintiff applied to defendant for new bills in their stead, according to 9 & 10 W. 3. c. 17., but defendant would not give them. Preston and Co. became insolvent before April, 1810, owing defendant 1000*l.*: the bills had been drawn for defendant's accommodation, but during their currency defendant came under engagement for Preston and Co., which created the debt from them of 1000*l.* On the 13th and 20th of April, 1810, payment of each sum was demanded of Preston and Co. and refused, but no notice thereof was given to defendant. Lord Ellenborough thought defendant entitled to notice as to each sum, and discharged by want thereof as to each, and nonsuited plaintiff, and B. R. refused to set aside the nonsuit.

any right to expect payment by him, yet, evidence (152) cannot be received for the purpose of showing that the drawer has not, from the insolvency of the drawee, or other causes, been prejudiced by the want of such notice.

It is no excuse for not presenting a bill in due time, and giving notice to the drawer, that the acceptor had told the drawer he could not take up the bill and the drawer must, and that the acceptor had given the drawer part of the amount for that purpose. (153)

But the money so given may be recovered by the holder of the bill against the drawer as money had and received to the holder's use. (153)

It is (154) no excuse for not giving notice to the drawer,

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(152) Dennis v. Morrice, 3 Esp. N. P. C. 158. In an action on a bill, brought by an endorsee against the drawer, it appeared that no notice had been given to the defendant of non-payment by the acceptor: to excuse which the plaintiff offered to prove, that, in fact, the defendant had not been prejudiced by the want of such notice. But Lord Kenyon said, the only case in which notice is dispensed with, is where the drawer had no effects in the hands of the drawee. This would be extending the rule still further than ever has been done, and opening new sources of litigation, in investigating whether, in fact, the drawer did receive a prejudice from the want of notice or not. He rejected the evidence, and nonsuited the plaintiff.

(153) Baker v. Birch, 3 Camph. 107. In an action against the drawer of a bill for 23*l.*, it appeared, that before it became due the acceptor told defendant he could not pay it, but defendant must, and that he gave him five guineas towards it; but the bill was not presented for payment till some days after it became due, nor was proper notice given of its dishonor; and Lord Ellenborough held defendant discharged upon the bill for want of notice, but he thought plaintiff entitled to recover the five guineas, as so much money received to his use; and verdict accordingly.

(154) Clegg v. Cotton, 3 Bos. & Pull. 239. Endorsees against the drawer of a bill. The bill was drawn in America on Cullen, of Liverpool, in favor of Miller and Robertson, and by them endorsed to Booth & Co., and it afterwards came to the plaintiff's hands. It was dated in 1794, and drawn at ninety days' sight. In 1800, the defendant having other effects of Cullen's in his hands, deposited them with Miller and Robertson, and Booth & Co., on an undertaking from them that they would return these effects whenever it should appear that they were exonerated from this bill. Cullen afterwards became bankrupt: the defendant was arrested, and then said that he should apply to Cullen's assignees to bail him, for he had lodged property in America to answer the bill, and if he were discharged by want of notice, he should pay it over to them. Acceptance and payment were both refused, but no notice was ever given of it to the defendant. Chambre J. nonsuited the plaintiff on the ground that the defendant was dis-

that on an apprehension that the bill would be dishonored, he lodged other money, which he had of the drawee's, in the hands of the endorser, on an undertaking by the endorser, that he would return it whenever it should appear that he was exonerated from the bill; for, his having other money of the drawee's does not entitle him to apply it to the dishonored bill, unless he has due notice of the dishonor.

Nor (155) is it any excuse for not giving notice, &c. to the drawer of a bill, if he had effects in the hands of the drawee, that the drawee represented to the drawer, when the bill was drawn, that he should not be able to provide for it, and that the drawer thereby understood that he should have to provide for it.

It is no excuse for not presenting for payment, that defendant, the drawer, told the holder, the day the bill was due, that he hoped the bill would be paid, that he would see what he could do, and endeavor to provide effects (156);

And though the drawee said the preceding day that he had no effects. (156)

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charged for want of notice: and on rule nisi to set aside the non-suit, and cause shown, the Court held, that the special circumstances did not excuse the want of notice; that there was no fraud in the defendant, which was the ground of the rule for dispensing with notice; and that when Miller and Robertson, and Booth & Co. were exonerated, which they also were by want of notice, the money deposited with them belonged to Cullen's assignees. Rule discharged.

N. It did not appear that the defendant had got back the property which he deposited, but that circumstance was not relied on.

(155) Staples v. Okines, Esp. 332. In an action against the drawer of a bill, the defence was, want of notice; the plaintiff thereupon called the acceptor, who proved that when the bill was drawn he was indebted to the defendant in more than the amount of the bill, but that he then represented to the defendant that it would not be in his power to provide for the bill when it should become due, and that it was therefore then understood between them, that the defendant should provide for it, and it was contended that this superseded the necessity of giving the defendant notice; but Lord Kenyon held it did not, and nonsuited the plaintiff.

(156) Prideaux v. Collier, 2 Stark. 57. In an action against the drawer, on a bill due 23d May, it appeared that plaintiff, the holder, applied to the drawee the 22d, and received for answer that he had no effects, but the drawer would probably provide them: the next day plaintiff saw the drawer, who said he hoped the bill would be paid, he would see what he could do, and endeavor to provide effects: plaintiff

It has been holden, that if the drawer had no effects in the hands of the drawee, though the payee had, and the bill were drawn for accommodation of the payee, the drawer is not entitled to notice; at least, that he is not entitled on the ground of the payee's effects (157);

But, inasmuch as the drawer of a bill for accommodation can, on paying the bill, sue the person for whose accommodation it was drawn, the drawer would, according to several decisions (158), be, under such circumstances, entitled to notice.

Proof that the drawer had no effects in the hands of the drawee, nor any ground to expect payment by him, is no evidence that the payee or any of the endorsers could not have brought an action on paying the bill, and therefore does not excuse the want of notice to them. (159)

[It is not sufficient to excuse a want of due diligence in giving notice to an endorser of a bill or note, that he was not injured by the neglect. (*w*)]

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did not present the bill that day, and on question whether his neglect was excused, Lord Ellenborough held it was not, and plaintiff was nonsuited.

(157) Walwyn v. St. Quintin, 1 Bos. & Pull. 652. In an action by endorsee against the drawer of a bill, it appeared to have been drawn to accommodate the payee, who had placed securities to raise money in the hands of the drawee. The defendants had no effects in the hands of the drawee; and no notice having been given to him of the dishonor of the bill, the question was, whether that were made necessary by the payee's having effects in the hands of the drawee? Eyre C. J. directed a verdict for the defendant, with liberty to the plaintiff to move to enter a verdict for him. After rule nisi accordingly, cause shown, and time taken to consider, the Court held, that the defendant was not entitled to notice. But posteà to the plaintiff on another ground.

(158) Corey v. Scott, antè, p. 305; Norton v. Pickering, antè, p. 306; Brown v. Maffey, post, p. 315.

(159) Goodall v. Dolley, antè, p. 297, 302; Wilks v. Jacks, antè, p. 295. [S. P. Denniston v. Imbrie, 3 Wash. C. C. R. 396; Ramdulollday v. Darieux, 4 Wash. C. C. R. 396.

See also Warder v. Tucker, 7 Mass. R. 449; Fotheringham v. Price, 1 Bay, 291.

If the endorser at the time of making his endorsement, knows that the drawer has no funds in the hands of the drawee, a question has been made whether the endorser is entitled to notice in order to charge him. See Fenwick v. Sears, 1 Cranch, 259.]

[(*w*) Hill v. Martin, 12 Martin, 177.]

If the payee of a note lend his name merely to give it credit, and to enable the maker to raise money upon it, and know at the time that the maker is insolvent, it has been holden that he (160) is not entitled to notice, and that it (160) is no defence for him that the note was not properly presented for payment.

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(160) De Berdt v. Atkinson, 2 H. Bl. 336. In an action against the payee of a note, it appeared that the note was not presented for payment till the day after it became due, and that no notice was given to the defendant till five days after such presentment; but it also appearing that the defendant gave no value for the note, that he lent his name merely to give it credit, and that he knew, at the time, that the maker was insolvent. Eyre C. J. directed the jury to find for the plaintiff, which they did. A rule to show cause why there should not be a new trial was afterwards granted, and upon cause shown, per Eyre, C. J. "If the maker is not known to be insolvent, insolvency will not excuse the want of an early demand; but knowledge excludes all presumption, which would otherwise arise; here the money was to be raised upon the defendant's credit; he meant to guarantee the payment, and no loss could happen to him from the want of notice." And per Buller J. "The general rule is only applicable to fair transactions, where the bill or note has been given for value in the ordinary course of trade; it is said insolvency does not take away the necessity of notice; that is true where value has been given, but no further; here the defendant lent his name merely to give credit to the note, and was not an endorser in the common course of business." Heath and Rooke Js. concurring, the rule was discharged.

The Court appears to have proceeded upon a misapplication of the rule which obtains as to accommodation acceptances; in those cases the drawer, being himself the real debtor, acquires no right of action against the acceptor, by paying the bill, and suffers no injury from want of notice of non-payment by the acceptor. But in this case the maker was the real debtor, and the payee a mere surety, having a clear right of action against the maker, upon paying the note; and therefore entitled to notice to enable him to exert that right.

[It has been repeatedly decided in the United States, that the endorser of a note is entitled to notice, even if the maker of the note is notoriously insolvent when it is made, or becomes so previously to its maturity. See the cases cited antè, p. 240, note.

And a person who endorses a note merely for the accommodation of the maker, cannot be charged as endorser, unless there has been a regular demand of payment, and due notice given him of the non-payment. Marshall C. J. in delivering the opinion of the Court, said, "In point of reason, justice, and the nature of the undertaking, there is no case in which the endorser is better entitled to demand strict notice, than in the case of an endorsement for accommodation, the maker having received the value." French v. Bank of Columbia, 4 Cranch, 141.

So the endorser of a bill is entitled to notice, notwithstanding the drawer of the bill becomes insolvent, and leaves the country, before the holder of the bill receives information of its dishonor. May v. Coffin, 4 Mass. R. 341.]

But inasmuch as the payee, in that case, would, upon paying the note, have a clear right of action upon the note, against the maker, it would seem that he is entitled to notice of the dishonor, or to make non-presentment in time a ground of defence; and it was soon afterwards held, that where the payee of a note lent his name merely to guarantee a debt from the maker, and expected it would not be paid, and had desired the banker at whose house it was payable to send it to him and he would pay it, he was discharged by a neglect to present in proper time (161); and in a later case, where the name was lent to give the maker credit with his bankers, the Court thought notice to the payee essential. (162)

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(161) Nicholson v. Gouthit, 2 H. Bl. 609. Gouthit and Burton undertook to guarantee an instalment on the debts of Greens, and for that purpose Greens drew notes payable to Gouthit at Drury and Co.'s, which Gouthit and Burton endorsed, after which they were delivered to the creditors. Before they became due Gouthit inquired at Drury and Co.'s if they had any effects, and on their saying they had not, he desired them to send the notes to him, and he would pay them; many notes were accordingly presented and paid, but the note in question not being presented till three days after it was due, Gouthit refused to pay it. Burton had supplied him with money to take up all the notes, but as this was not presented when due, he had returned the money destined to pay it. An action was brought against Gouthit; and upon the trial, Eyre C. J. thought, as he knew the note would not be paid at Drury and Co.'s, and had provided money for it, and as his endorsement was by way of guarantee, he was not injured by the delay; and that the request to send the notes to him was either a waiver of notice, or notice by anticipation; but on a rule nisi to enter a nonsuit, and cause shown, though he thought the justice was clearly with the plaintiff, he thought he could not recover, for though the endorsement was by way of guarantee, it was liable to all the legal consequences of an endorsement, and Gouthit's promise to pay was only to pay such as should be duly presented at Drury's. Heath and Rooke Js. were of the same opinion, and the rule was made absolute.

(162) Smith and others v. Beckett, 13 East's Rep. 187. In an action against the payee and endorser of a note, drawn by Canning, dated the 28th of October, 1809, and payable on demand; it appeared that the defendant had lent his name to this, and other notes, merely to enable Canning to obtain credit with the plaintiffs, his bankers, he having then lately stopped payment, which was well known to all the parties. The plaintiffs made advances for six months upon these notes, which advances they afterwards renewed without any communication with the defendant. On the 28th of May, 1810, Canning became bankrupt, and payment from him was afterwards demanded and refused; but no notice of this dishonor was given to the plaintiffs. Lord Ellenborough thought a notice necessary, and therefore nonsuited the plaintiffs. And on a motion to set aside the nonsuit, De Berdt v. Atkinson was cited;

And in a (163) subsequent case, where a bill was drawn for the accommodation of a remote endorsee, and the names of all the prior parties were lent to him, it was holden, in an action against one of those parties, an endorser, that the latter was entitled to notice of the dishonor of the bill; because, upon paying it, he would be entitled to sue such endorsee for repayment.

But if the payee of a note lend his name, and take effects of the drawer to answer it (164), he is not entitled to notice; because, he is the proper person to pay it, and would be entitled to no remedy over on making the payment.

[So where a debt is secured by mortgage, and the mortga-

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but the Court held clearly that a notice was necessary, especially as the advances had been renewed without the defendant's knowledge. Rule refused.

(163) Brown v. Maffey, 15 East, 216. Action on a bill drawn by Whitmarsh on J. and H. Neale, payable to Fiander or order, endorsed by Fiander to the defendant, by the defendant to Cosier, by Cosier to Wood, and by Wood to the plaintiff. The bill was drawn for Wood's accommodation, and all the prior names were lent to him. It did not appear that the defendant knew that any name was lent, except his own. The bill was dishonored, but notice of the dishonor was not sent to the defendant. Bayley J. thought the notice necessary; because, if the defendant had paid the bill, he would have been entitled at least to have sued Wood, and therefore nonsuited the plaintiff. A rule nisi was granted to set aside the nonsuit, and De Berdt v. Atkinson, and Sisson v. Tomlinson, 1 Selwyn's Ni. Pri. 357. n. were cited; but on cause shown, the Court thought it clear that the defendant was entitled to notice. Rule discharged.

(164) Corney v. Da Costa, Espinasse, 302. Da Costa and Co. compounded with their creditors, and to secure the composition, drew notes in favor of the defendant, which he endorsed to the creditors. The defendant took effects of Da Costa and Co., at the time, to the amount of the composition; and an action being brought against him upon one of these endorsements, he insisted that he had no notice of the non-payment of the note until five weeks after it was due; but Buller J. held he was not entitled to notice, and the plaintiff had a verdict. [See also the cases antè, p. 313. note (160.)]

[The law of France goes on the same principle that the person who receives property with which a bill ought to be paid, is bound without presentment or notice.

"Les effets de la dèchèance prononcée par les trois articles prècèdens, cessent en faveur du porteur contre le tireur, ou contre celui des endosseurs qui, apres l'expiration des delais fixès pour le protêt, la notification du protêt ou la citation en jugément, a reçu par compte, compensation, on autrement, les fonds destinès au paiement de la lettre de change." Code de Com. L. I. T. 8. art. 171.]

gee signs a note which is endorsed by the mortgager, and assigns the mortgage as security for the payment of the note, with the knowledge and consent of the mortgager, the mortgager is liable as endorser without proof of demand or notice. (*x*)

If a person who endorses a bill for the accommodation of the drawer, knows when he endorses it that there is no expectation of its being paid by the drawee, he will be liable as endorser without proof of presentment or notice. It seems that making such a bill is a fraud upon the holder. (*y*)]

It is no excuse for not giving notice to the payee, that the drawer and drawee are non-existing persons, and that their names were used for the purpose of fraud; unless the payee were privy to the fraud (165);

So it is no excuse that there was a parol agreement between plaintiff and defendant, that payment should not be demanded till certain estates were sold. (166)

[Where the money raised upon a note is received by an endorser, and he is the person ultimately to pay, notice to him of non-payment by the maker is perhaps not necessary. (*z*)]

Upon an acceptance payable at a banker's, notice of non-payment need not be given to the acceptor; for he makes the bankers his agents; presentment to them is presentment to him, and refusal by them is refusal by him (167);

[(*x*) Martel v. Tureand, 18 Martin, 118.]

[(*y*) Farmers' Bank v. Vaumeter, 4 Rand. 553.]

(165) Leach v. Hewitt, 4 Taunt. 731. Cattle drew a bill in the name of Rogers, Crooke, and Co., upon Rogers and Co., 83, Lombard Street, payable to defendant or order, and got defendant to endorse it: there were no such houses as Rogers, Crooke, and Co., or Rogers and Co., but Cattle used those names for the purpose of fraud. Action against defendant by a bonâ fide holder; defence, want of notice: Mansfield C. J. told the jury, that if defendant was a party to the fraud, he was not entitled to notice, but if he acted innocently, he was: the jury thought he acted innocently, and nonsuit: and on motion for new trial, the Court held him entitled to notice, and rule discharged.

(166) Free v. Hawkins, post.

[(*z*) By Thompson C. J. in Agan v. M'Manas, 11 Johns. R. 180.]

(167) Smith v. Thatcher, 4 B. & A. 200. Drawer against accepter on a bill for 300*l.*, accepted payable at Messrs. Coutts and Co.'s: no proof was given of notice to defendant when the bill was dishonored; but it appeared, that though he had 712*l.* at Coutts's when the bill was

Especially where what he has in their hands when the bill becomes due is so much below the amount of the bill, that he could have no reasonable expectation they would pay it. (167)

And it makes no difference, though he had enough in their hands when the bill was drawn. (167)

So upon a note payable at a banker's, notice of non-payment need not be given to the maker. (168)

A person who has been once discharged by laches from his liability on a bill or note, is always discharged. And therefore where two or more parties to a bill or note have been so discharged, but one of them, not knowing of the laches, pays it, he pays it in his own wrong, and (169) cannot recover the money from another of such parties.

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drawn, he had only 41*l.* when the bill became due, and on the ground of the inadequacy of that sum to pay the bill, Bayley J. directed a verdict for plaintiff. On motion for a new trial, Abbott C. J. expressed a strong doubt whether notice need, in any case, be given to the acceptor, because the banker was his agent; but he and the other judges held, that where the effects were insufficient, as here, notice was not necessary. Rule refused.

Treacher v. Hinton, 4 B. & A. 413. Endorsee against acceptor, on bill addressed to defendant at Plymouth, and accepted by him, payable at Sir John Lubbock and Co.'s, bankers, London. Plaintiff proved the acceptance, and presentment at Sir John Lubbock's, but there being no evidence of notice to defendant of the bill's dishonor, Abbott C. J. nonsuited plaintiff, with leave to move to enter a verdict for plaintiff: rule nisi accordingly; and on cause shown, the Court thought the notice not necessary; that the acceptance was not a check upon the banker, but merely made the banker the acceptor's agent, and then it was for him to see that his agent did his duty.

(168) Pearse v. Pemberthy, 3 Campb. 261. Action against the maker of a note payable at Were, Bruce & Co.'s: the place of payment being a material part of the instrument, it was urged that defendant should have had notice of the note's dishonor; for the answer being "not sufficient effects," showed there were some effects there. Lord Ellenborough thought notice unnecessary, and verdict for plaintiff.

(169) Roscoe v. Hardy, 12 East's Rep. 434. Acceptance of a bill was refused: of this, however, the holders gave no notice; but when the bill became due, they again presented it for payment, and that being refused, they called upon the plaintiff, an endorser, for payment, and he, being ignorant of their laches, paid it. He now sued the defendant as his endorser, who set up the laches of the holders as a defence; and the plaintiff was nonsuited. On motion to set aside this nonsuit, it was urged that the plaintiff ought not to be prejudiced by the laches of subsequent holders, of which he was ignorant, without the means of information. But the Court held that his ignorance,

[Where the drawer of a bill is discharged for want of notice, though he may by waiving notice render himself liable, he cannot by so doing prejudice the rights of a person not a party to the bill. (*a*)

But where A., at the request of B., endorsed a note made by C. and payable to A., in order to enable B. to raise money on it, B. promising to indemnify A., and A. afterwards paid the note and brought an action against B. to recover the amount. After verdict in favor of the plaintiff, it was held that it was too late to object that the plaintiff had not been duly notified as endorser of the note. (*b*)

The commencing of a suit by the holder of a note against the maker, does not render notice to the endorser unnecessary. (*c*)

Where a note is void for illegality of consideration between the maker and payee, an innocent endorsee of the payee may recover against his endorser, though there has been no demand or notice. (*d*)

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which had prevented his availing himself of this laches as a defence, could not alter or revive the liability of the defendant, who had been discharged by the same laches.

[(*a*) Grosvenor v. Stone, 8 Pick. 79. Grosvenor, an agent of Stone and Kent, had purchased goods for them, and by their orders had drawn a bill in his own name, but for their account, on Williams. The bill was accepted, but the acceptor failing, it was not paid at maturity. It was afterwards taken up by Wiggin by mistake for the honor of Draper and Stone, who were not parties, Wiggin claiming to hold all the parties; but no notice of the dishonor was given to Grosvenor. Wiggins sued Grosvenor, and recovered judgment against him upon a default by consent. In an action by Grosvenor against Stone, as surviving partner against Stone and Kent, for the price of the goods, it was held that he could not waive notice to the prejudice of Stone and Kent, and that the action was not maintainable.]

[(*b*) Cornwall v. Gould, 4 Pick. 444.]

[(*c*) Harwin v. Lowell, 2 S. Car. R. 193.]

[(*d*) M'Dugall, the payee of a note given to him for an illegal consideration by the maker, endorsed it to Copp. Copp, having failed in an action brought by him against the maker, sued M'Dugall as endorser; and the Court held, that the consideration between the maker and M'Dugall being illegal, Copp might maintain his action against M'Dugall, without proving a demand and notice of non-payment. Sewall J. giving the opinion of the Court, compared this to the case of a bill, where the drawer has no funds in the hands of the drawee or acceptor, "the endorser standing in the relation of the drawer, and the promissor being acceptor:" and said, "when the promise or acceptance is void, as it is in case of usury between the drawer and accepter, if he will resort to that defence against his promise, the contract be-

So if a note be given without consideration to the payee, an endorser of the payee may recover of the payee as endorser, without proving presentment and notice. (*e*)

If the maker of a note be dead when it falls due, and no administration taken out, this is no sufficient excuse for not giving notice of the non-payment to the endorser. (*f*)

Where the maker of a note dies, and administration on his estate is granted to an endorser before it falls due, the endorser is still discharged, if not duly notified of its non-payment. (*g*)

The death of the holder of a bill or note before it becomes due, and no administration being taken out before that time, will not prevent the parties to the instrument from being discharged in consequence of the want of due presentment and notice. (*h*)

It has been held to be no excuse for not giving notice to an endorser of a bill or note, that he has moved out of the State since he endorsed. (*i*)

It does not seem to be settled how far the prevalence of an epidemic to such an extent as to put a stop to the regular course of business, is an excuse for not presenting a bill or note or giving notice of its dishonor. (*k*)

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comes, as it respects the endorser, a draft accepted without funds, that is, in the case of a promissory note." Copp v. M'Dugall, 9 Mass. R. 1.]

[(*e*) Chandler v. Mason, 2 Verm. R. 193. In this case it was also held that the want of consideration could be proved only by such evidence as would be competent in an action against the maker, and therefore that the maker himself was not a competent witness to prove the want of consideration.]

[(*f*) Price v. Young, 1 M'Cord, 339.]

[(*g*) Juniata Bank v. Hale, 16 S. & R. 157.]

[(*h*) Price v. Young, 1 M'Cord, 339.]

[(*i*) Gist v. Lybrand, 3 Hamm. 307.]

[(*k*) In a case in New York, it was held that the prevalence of a malignant fever which put a stop to all business at the place of residence of the drawer of a bill, was a sufficient excuse for not giving notice to him until November of a protest for non-payment made in September. Tunno v. Lague, 2 Johns. Cas. 1. But Van Ness J. in a subsequent nisi prius case, ruled that the prevalence of an epidemic was no excuse for not giving notice during its continuance. Roosevelt v. Woodhull, Anth. N. P. 35.]

CHAP. VIII.

Payment—to whom.
If the Proprietor die.
——————— *become Bankrupt.*
——————— *be under Age.*
——————— *Coverture.*
Bankrupt.
Customer, where the Bill or Note is in his Banker's Hands.
In case of forged Bill.
——————— *though with genuine Signature,*
——— *upon unwarranted Signature by Procuration.*
Where a Banker's Name is written across, or there is any other circumstance to guard against improper payment.
— *by whom.*
Bankrupt.
———, *Stranger.—For Honor.*
— *when.*
Before Protest.
Before due.
After due.
What is evidence of.
By party not liable.
Effect of.
Obligation of Drawee to pay.

Payment should be made to the (1) proprietor of the bill

(1) Pothier, pl. 164.
[The payee of a note left it in the care of his son, with directions not to receive payment from the maker. The maker however, with a

or note, or to some person authorized by him to receive payment.

If the proprietor die, payment should be made to his personal representative; if he become bankrupt to his assignees; if he be an infant, to his guardian; and payment to the (2) infant himself may, under circumstances, be good; at least, if it be beneficial to him.

Where payment is made to an executor having probate, the payment will be a good discharge to the person making it, though the bill be really a forgery. (3)

In the case of a married woman, payment should be made to (4) her husband.

Payment *to* a bankrupt before the date and issuing of a commission against him, will be (5) good, if made bonâ fide, and without notice of any act of bankruptcy: and payment by the drawee of a bill, drawn by a trader after a secret act of bankruptcy (6), and accepted by the drawee bonâ fide, and

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knowledge of these directions, paid the money to the son before it became due, and received the note from him. It was held that the payee might maintain trover for the note against the maker, because the son had no authority to receive the money. Kingman v. Pierce, 17 Mass. R. 247. See Cod. de Com. Liv. 1. Tit. 8. sec. 9. n. 2. 3.]

(2) See Pothier, pl. 166.

(3) A bonâ fide payment of a debt to a person who has the probate of a will purporting to be the creditor's, will discharge the debtor, if the creditor be dead, though the will afterwards turn out to be a forgery, and the probate be annulled on that ground; because such payment is made on the authority of the probate; but it is otherwise (per Ashhurst and Buller Js.) if the creditor be living, because in such case the probate is a mere nullity. Allen v. Dundas, 3 Term. Rep. 125.

(4) See Connor v. Martin, antè, p. 117, n. (32), and Barlow v. Bishop, antè, p. 41, n. (8.)

(5) 1 Jac. 1. c. 15. s. 14. 6 Geo. 4. c. 16. s. 82.

(6) Wilkins v. Casey, 7 Term. Rep. 711. A factor was indebted to his principal in 222*l.* 18*s.*; the principal committed an act of bankruptcy, and drew on his factor for 222*l.* 18*s.*; the factor did not know of the act of bankruptcy, and accepted the bills; before they became due, a commission issued, notwithstanding which the factor paid them; the assignees sued the factor for the 222*l.* 18*s.*; and on a case reserved, insisted that though the statute (1 Jac. 1. c. 15.) would protect a *payment* before notice of the bankruptcy, it would not a mere acceptance. Sed per Lord Kenyon, the statute ought to receive a liberal construction; giving goods in exchange would have been a payment, though not in money; and so is giving an acceptance, if the bill be paid when due. The other Judges concurred, and the plaintiff had judgment.

without notice of any act of bankruptcy, will perhaps be protected, though the bill do not become due until it is notorious that a commission against him has issued. The acceptance, which creates an obligation to pay, was within the protection of 1 Jac. 1. as much as actual payment, and it is probably under the protection also of 6 Geo. 4. c. 16. s. 82.

And payment to a bankrupt, or accepting on his account, even after a commission issued, will be as much protected as a payment before, if the party paying or accepting knew nothing, and had not the means of knowing, of such commission. (7)

And payments *to* a bankrupt are entitled to a different consideration from payments *by;* vacating the former makes the party pay twice, vacating the latter only puts one creditor on the same footing with the rest.

Payment to a customer, where a dishonored bill or note is in the hands of his banker, will destroy all claim upon it by the banker, if the banker carry it to the customer's debit as soon as it is dishonored, and the subsequent payments by the customer cover and discharge such debit. (8)

Especially if the accounts between the customer and banker be continued for a long space of time, and the banker never notice such bill or note. (8)

And if the banker upon the bankruptcy of the customer prove his balance against him, and in the exception as to securities be silent as to this. (8)

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(7) Sowerby v. Brooks, 4 B. & A. 523. On 7th October a commission issued against Carbutt, but it was not gazetted till 5th November. 30th October, Sowerby accepted a bill drawn on him by Carbutt for 95*l.* 4*s.*, a sum he owed Carbutt: he had no reason to suppose at that time that the commission had issued, or that Carbutt was a bankrupt or insolvent. Carbutt's assignees sued Sowerby for the old debt, and he relied on his acceptance, which he paid when due, as a discharge: the Court of Common Pleas thought it no discharge, on the ground that the issuing of the commission was notice to all the world of the bankruptcy; but the facts being stated in a special verdict, the Court of King's Bench, on error, thought otherwise, and reversed the judgment.

(8) Field v. Carr, 5 Bing. 13. Defendant was the acceptor of two bills due 22d February, 1828, payable to Crawshaw. Crawshaw endorsed them to plaintiffs, his bankers; and plaintiffs entered them to Crawshaw's credit; they were dishonored, and plaintiffs then carried

[Where a due bill or note is not negotiable, payment to the payee personally is sufficient to discharge the maker, although the instrument has been assigned to a third person, unless the maker has "direct and positive notice of the assignment." (*a*)

Payment by one of two joint makers of a note, gives him a right of action against the other maker for a contribution. The receipt of the holder on the note stating that the note was paid by one of the makers, and the possession of the note by such maker is primâ facie evidence of the liability of the other maker to repay him one half of the amount. (*b*)]

Before a drawee pays a bill he has not accepted, and before a banker pays a bill accepted payable at his house, he should be satisfied that the signature importing to be the drawer's is genuine. (9)

If it be not, he will not be entitled to recover back the money. (9)

At least he will not, unless he discover the forgery, and give notice thereof the same day. (9)

A discovery and notice the following day will be too late. (9)

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them to Crawshaw's debit. Defendant paid Crawshaw the amount in April, 1823, but the bills remained with plaintiffs. Crawshaw made payments to plaintiffs, which reached far beyond the debit of these bills, and balances were struck between plaintiffs and Crawshaw at the end of 1823, 1824, and 1825, and these bills were not noticed. April, 1826, Crawshaw became bankrupt, and plaintiffs proved under his commission; and, in the exception as to securities, stated that they had no security save and except certain other bills, not these. In 1827, plaintiffs called upon defendant to pay these acceptances, and brought this action: defendant was surprised at the trial, and plaintiffs had a verdict: but upon affidavits disclosing the state of accounts between plaintiffs and Crawshaw, and some other matters on which the surprise consisted, the Court held, that if the payments by Crawshaw would extend to wipe out the item of debit upon these bills, which they clearly did, these bills were to be considered as paid, and a new trial was accordingly granted.

[(*a*) Meaghan v. Mills, 9 Johns. R. 64.]

[(*b*) Ingram v. Croft, 7 La. R. 82.]

(9) Price v. Neale, Burr. 1354; Blackst. 390. Two forged bills were drawn upon the plaintiff, which he accepted and paid: on discovering the forgery he brought this action for money had and received to recover back the money; but on a case reserved, the Court held it would not lie; and Lord Mansfield said, "It was incumbent on him to have been satisfied, before he accepted or paid them, that the bills were the drawer's hand:" and in Smith v. Chester, 1 Term. Rep. 655, Buller J. says, "When a bill is presented for acceptance, the acceptor looks

Nor can he charge the supposed drawer or acceptor with the amount.

And a man who pays for honor, must be satisfied that the name of the person for whose honor he pays is genuine; otherwise, he will not be entitled to charge the amount against his principal; nor can he recover back the money unless he discover his mistake and give notice thereof the same day. (10)

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to the hand-writing of the drawer, which he is afterwards precluded from disputing, and it is on that account that he is liable, even though the bill is forged."

Smith v. Mercer, 6 Taunt. 76. A bill was drawn on Evans, payable to Temple, endorsed by him to Le Souef, and by Le Souef to defendants: defendants endorsed it, that their correspondents in town might get it paid: it had upon it, when defendants took it, this acceptance, "Smith, Payne and Smiths, Maurice Evans." This was a forgery; but defendants did not know it: when the bill became due, Smith, Payne and Smiths paid it, but at the end of a week they discovered the forgery, and gave notice thereof to defendants, and on their refusal to refund the money, brought an action for money had and received. On a special case, Chambre J. thought plaintiffs entitled to recover, because defendants, by endorsing the bill with the forged acceptance thereon, had impliedly vouched for its authenticity, and because there was no blame or negligence imputable to plaintiffs, and it was against conscience in defendants to keep their money, for which they got nothing; but the other Judges thought plaintiffs not entitled: Dallas and Heath Js., because it was plaintiffs' duty to know their customer's hand before they paid the bill; and Gibbs C. J. because plaintiffs' conduct had prevented notice to those parties defendants might have sued, and had therefore destroyed the remedy against them. Postea to defendants.

Cocks v. Masterman, B. R. sittings after Trin. 1829. [9 B. & C. 902.] A bill importing to be drawn upon Sewell and Cross, due 24th May, had upon it a forged acceptance in the name of Sewall and Cross, making it payable at Cox and Biddulph's, bankers, London: defendants, who were also London bankers, received it from a customer, Saunderson and Co., and presented it for payment on the 24th. Plaintiffs, believing the acceptance to be genuine, paid the bill; but the next day they discovered the forgery, and about one o'clock on that day they gave notice thereof to defendants, to Saunderson and Co., and to the endorsers. Defendants having refused to return the money, plaintiffs sued them: the jury found a special verdict, and upon argument it was insisted, that as the mistake was discovered by plaintiffs in time for giving the proper notices, to prevent any of the parties to the bill from being discharged, they had a right to recover back the money: but, on time to consider, the Court considered it clear that the holder of a bill was entitled to know on the day it became due whether the bill was to be considered as honored or not, and that if he were suffered throughout that day to suppose it was honored, it was too late the next day to tell him it was not. Judgment for defendant.

(10) Wilkinson v. Johnston, 3 B. & C. 428. Three bills, with an endorsement in the name of A. Heywood, Sons and Co., being dishon-

And before any change of circumstances. (10)

But if he make the discovery, and give notice thereof the same day, and before any change of circumstances, he may recover back the money. (10)

Especially if the person, to whom he made the payment, brought him the bill upon the supposition that the signature was genuine. (10)

And it will be no bar to his claim for restoration of the money, that he had struck out the names of several endorsers. (10)

But, he may be liable for whatever damages that striking out occasions. (10)

And whoever pays a bill should be satisfied it is, in all its parts, genuine: if it be not, he will pay it at his peril, and will lose his remedy against the party on whose account he pays it. (11)

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ored, the notary carried them to plaintiffs, the London bankers of A. Heywood Sons and Co., that they might take them up for the honor of A. Heywood Sons and Co., which they did immediately, at about 11. A. M. Plaintiffs cancelled the names of every endorser subsequent to the name of A. Heywood Sons and Co., by running the pen through them, as soon as they paid the bills. But plaintiffs very soon discovered that the endorsements were forged, and before one A. M. they gave notice to Smith and Co., defendants' agents, by whom the notary had been employed, and who had received the money, and demanded the money back, and on non-payment sued defendants. Case and two arguments, and after time to consider, the Court held plaintiffs entitled to recover: they were not alone to blame; part of the fault was in defendant's notary, who brought the bills to them as genuine, and thereby led them into the mistake; they corrected the mistake in time to prevent any party to the bills being discharged by want of notice, and before the situation of any of the parties could have been altered; the cancelling the endorsements, being by mistake, did not vacate them, the endorsers might still be sued, and if such cancellation caused damage or additional expense to any one, it might make plaintiffs liable to bear that damage; but that damage would not necessarily extend to the whole amount of the bills, and therefore was no defence to the action. Postea to plaintiffs.

(11) Hall v. Fuller, 5 Barn & Cr. 750. Plaintiff lent Wagstaffe a check on plaintiff's bankers, defendants, for 3*l*.: W. altered the 3*l*. into 200*l*.; and defendants paid it: they insisted on charging plaintiff with the 200*l*.; and, on case, it was urged that plaintiff should not have drawn on his banker for so small a sum as 3*l*., and that the forgery was such that common observation would not have detected it: this was true; but the Court said, it did not appear defendants had ever prohibited plaintiff from drawing for so low a sum, and hard as the case

Thus, if a banker pay a check which has the genuine signature of his customer, he will not be entitled to charge it against his customer, if the amount has been altered by forgery since the customer issued it. (11)

And it will give the banker no claim, though the customer drew it for a sum below what drafts on bankers are usually drawn for, and lent it to a friend. (11)

But if a bill be drawn in a careless and informal mode, and that mode facilitates, and perhaps suggests, the commission of the forgery, the customer, and not the banker, shall bear the loss. (12)

As, if in the first word for the amount a small letter be used instead of a capital one, and space be left for prefixing a previous word; and where the amount is specified in figures, space be left where a previous figure may be introduced, and the bill be left in the possession of the person by whom the words and figures to denote the sum were written, and by whom the forgery was afterwards committed.

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might be, defendants had authority to charge against plaintiff such sums only as plaintiff had ordered him to pay, and here plaintiff had only ordered him to pay 3*l*. Posteà to plaintiff.

[Where the first of a set of exchange is lost by the payee, and the payee's name forged upon it; payment by the drawee to a stranger, will be no defence to an action on the second of the set by the payee against the drawer, the proper steps having been taken to charge him upon it. Depan v. Browne, Harper's R. 251.]

(12) Young v. Grote, 4 Bingh. 253. Young left a blank check with his wife, duly signed by him, that she might fill in sum and date according to what she might want: she wanted 50*l*. 2*s*. 3*d*. for wages, and by her orders Worcester, one of Young's clerks, filled it up accordingly, and showed it her, and she directed him to get it cashed by defendants, her husband's bankers: in filling up the check Worcester wrote the word fifty with a small initial, and left sufficient space on the left side for introducing any additional word, and he wrote the figures so as to leave space on the left side for any additional figure, and before presenting it Worcester put "three hundred and" before the word "fifty," and a 3 before the 5, so as to make it a check for 350*l*. 2*s*. 3*d*. Defendants paid it as such. Plaintiff would not allow that payment, and sued for his balance. The cause was referred: and the arbitrator found that there was gross negligence in suffering Worcester to have possession of the draft, drawn as that draft was, in his hand-writing, and with such spaces not filled up so as to exclude all chance of detecting the forgery; and that as plaintiff, or those with whom he was identified, by such negligence, were the cause of defendants paying the check according to its altered state, plaintiff ought to bear the loss: rule nisi that the award should be corrected, and defendants pay the money drawn.

When any of the signatures, through which the right to payment is conveyed, import to be by procuration, the person paying should satisfy himself the procuration was such as to warrant the signature. Otherwise it may be at his peril if he make the payment. (13)

And he should see that none of the endorsements are restrictive. (14)

If the drawer of a check write across it the name of the banker of the party to whom he pays it, it may be at the peril of the person paying it if he pay it to any person but that banker. (15)

And if the party to whom the drawer pays it have two accounts at his banker's, one in his own, and the other in a representative character, and the check, though made to him or bearer, speak of him as in his representative character, it will be for a jury to say whether such banker, if he receive the money, can carry it to his customer's separate account. (15)

Payment *by* a bankrupt, really and bonâ fide made in respect of a (16) bill or note before the date and issuing of a commis-

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(13) See East India Company v. Tritton, antè.

(14) See Ancher v. Bank of England, antè, Sigourney v. Lloyd, antè.

(15) Stewart, assignee of Payne, v. Lee and others, 1 Moody & M. 158. Crossthwaite and Stewart were assignees of Payne. Farebrother gave Crossthwaite, as one of such assignees, a check for 792*l.* 6*s.* 4*d.*, payable to "Messrs. Crossthwaite and Stewart, assignees of Payne, or bearer," and Lee and Co. being bankers to the assignees, Farebrother wrote their name across the check: the check was paid to Lee and Co.; but Crossthwaite, having another account with Lee and Co., as surviving partner of Wilkinson, he directed Lee and Co. to carry the money to that account, which they did. This action was, therefore, brought, and Lord Tenterden told the jury that any person who knowingly assisted another in applying money to a different purpose from that to which he was bound to apply it, could not say that was a proper application of the money; and that if the precaution of writing "Lee and Co." across the check were sufficient information to Lee and Co. to what account the money was to be applied, they would be answerable for not so applying it; but, that as that was a question of mercantile usage, it was a question for their consideration, and he, therefore, left it to them, Whether they ought to have known, from the form of the check, and the banker's name across it, that it was properly applicable to the account of the assignees. The jury thought it was not, and found for defendants.

(16) By 6 Geo. 4. c. 16. s. 82. "All payments really and bonâ fide made, or which hereafter shall be made by any bankrupt, or by any

sion against him, will be valid; provided the party paid were ignorant of any act of bankruptcy having been committed by such bankrupt.

After a foreign bill has been protested for non-payment, any person may pay it (under protest) for the (17) honor of the drawer or of an endorser; and he is entitled to demand repayment, not only from the person for whose honor he made the payment, but from (18) all other parties who are liable to that person.

But a person must not pay a foreign bill for honor unless it is protested. (19)

If he do, he will pay at his peril; he will have no remedy against the party for whose honor he pays it: for, it is part of the custom of merchants that the bill should be protested before such payment. (19)

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person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, such payment not being a fraudulent preference of such creditor, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed: provided the said person so dealing with the said bankrupt had not, at the time of such payment by such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

And see 6 Geo. 4. c. 16. s. 83. antè, note (5).

(17) Beawes, 2d ed. pl. 50.

(18) Beawes, 2d ed. pl. 57., and Mertens v. Winnington, post; Hall v. Pitfield, post, and exparte Lambert, post.

(19) Vandewall v. Tyrrell, 1 Moody & Malkin, 87. Defendant drew four bills at Jamaica, at nine months' sight; they were accepted, and became due 30th July, 1825; they were then dishonored, and noted, and on 8th August, plaintiff, at the instance of the acceptor, took them up for the honor of defendant: the bills were not protested till May, 1826, and the protest then made imported to have been made before plaintiff paid, and stated that plaintiffs were ready to pay. Lord Tenterden said, it was part of the custom that there should be a formal protest before payment could be made for the honor of any party to the bill; and he nonsuited plaintiff.

[In Louisiana the doctrine in regard to the payment of bills supra protest, is applied to promissory notes. H., on the day a note became due, at the hour the bank in which it was, was closing, called at the bank and paid the note, as he alleged for the honor of P., an endorser, and afterwards on the same day handed the note to a notary public, who demanded payment from the maker, which was refused. In an action brought by H. against P., it was held that the defendant was not liable, because the plaintiff had no right to pay the note until after it had been protested. Holland v. Pierce, 14 Martin, 499.]

[A person who wishes to pay a bill for the honor of any party to it, must be ready at the time and place of payment. (*c*)

Where one bill of a set having been protested for non-payment, and returned, the drawee afterwards makes payment to the holder on another of the set, such payment is good. And if a party to the bill, ignorant of this payment, subsequently pays the bill, to the person to whom the protested bill of the set has been returned, he may recover back such payment, as money had and received to his use. (*d*)]

[(*c*) An action was brought against Henderson and Cairns as endorsers of a bill drawn in the United States upon a house in London. Frears and Cairns, of Birmingham, were the agents of the defendants. After acceptance had been refused by the drawees, Frears informed Wallis, the holder of the bill, that if it was not paid, he and his partner would pay it, and requested Wallis to let them have the bill, if not paid by the drawees, which he promised to do. Payment having been refused by the drawees, Frears called on Wallis, and offered to pay the bill and expenses, if Wallis would let them have the bill. Wallis informed him that he had sent the bill to the post office to be sent to America. The defendants had funds in the hands of Frears and Cairns, with which they might have taken up the bill. Per Curiam. "The facts stated afford no ground of defence. If the agents meant to carry into effect the agreement with Wallis, they should have stood ready to pay and take up the bill in London where it was payable. Indeed the agreement with Wallis was a *nudum pactum;* the agents were not compellable to pay at any time." Denston v. Henderson, 13 Johns. R. 322.]

[(*d*) Durkin and Henderson having a bill in London, endorsed and sent it to M'Bride their agent at New York, for him to sell it. M'Bride endorsed and sold it to the defendants. They endorsed and sent it to Pigou and Co. of London, in payment of a debt from them to Pigou and Co. for about the amount of the bill. The first of the set having been duly presented was sent back to the defendants at New York, under protest for non-payment. And M'Bride, on notice being given him, paid the defendants the full amount of the bill and 20 per cent. damages. The defendants on the same day made a remittance to Pigou and Co., being partly to pay the balance on account of which the bill was remitted. The drawees of the bill had however, previously to the payment in New York, paid the amount with interest and charges to Pigou and Co. on the second of exchange; but this was not known to M'Bride when he paid the bill. Durkin and Henderson brought an action for money had and received to recover back the amount paid by M'Bride. Per Curiam. "The payment by the drawees must be considered as valid, although it was after protest for non-payment, because Pigou and Co. were the holders of the bill as general endorsees, and the legal title was in them. The notice to M'Bride, the bill having already been paid by the drawees, and the subsequent payment by him, were consequently founded in mistake,

Payment of a bill or note should not be made (20) *before* it has become due;

If it be, it is at the peril of the person paying.

A check upon a banker was lost, and paid to a stranger the day before it *bore date;* the banker was obliged to repay the money to the loser. (21)

[The holder of a bill or note is not obliged to receive payment of it before it is due, and therefore a tender to him of the amount of the bill or note before the day of payment, is inoperative, and cannot be set up as a defence to an action on it by the holder, or any person to whom he may endorse it with a knowledge of the facts. (*e*)

A tender by an endorser of a bill or note the day after it becomes due, is not sufficient without a tender of interest. (*f*)

If a surety on a note take it up and give his own note for it, this operates as payment of the first note, and the surety may support an action against his principal for money paid to his use. (*g*)

So if A., a debtor, give B. his creditor an order on C., who is indebted to B. for the payment of money, if B. takes a note on time from C. for the amount, he gives up all claim against A. (*h*)

An erased credit on the back of a bill or note is *primâ facie*

It was upon the assumption of a fact which did not then exist. The plaintiffs are entitled to recover back the whole sum paid, and the 20 per cent. inclusive and interest." Durkin v. Cranston, 7 Johns. R. 442.]

(20) Marius, 4th ed. p. 31., who observes, that if the drawee pay a bill before it has become due, and it appear that the payee was merely the factor or agent of the person who delivered it to him, and that person countermand the payment before the maturity of the bill, but after such payment by the drawee, the latter may be obliged to repay the money.

(21) See Da Silva v. Fuller, Chitty, 148.

[(*e*) Tillon v. Britton, 4 Halst. R. 121.]

[(*f*) In an action against the endorser of a note which fell due Sept. 28th, the defendant pleaded a tender of the amount of the note Sept. 29; the plaintiff replied a demand on the makers and notice to the defendants September 28. On demurrer judgment was given for the plaintiff. Parker C. J. said, in giving the opinion of the Court, "The doctrine of reasonable time for the endorser to pay, has not been received and acted upon in this country, and is doubted by the highest authority on this subject in England." City Bank v. Cutter, 3 Pick. 414.]

[(*g*) Lapham v. Barnes, 2 Verm. R. 213.]

[(*h*) Southwick v. Sax, 9 Wend. 122.]

evidence of the payment stated in it, but may be rebutted by testimony showing that the credit was erroneously made. (*i*)

If an endorser of a bill or note, who has not been charged by due presentment and notice should pay it, the payment is gratuitous, and he cannot recover on a bill or note which has been left with him as collateral security against his endorsement. (*k*)

By the usage of trade a merchant making a shipment may draw on the consignee, and the consignee is bound to pay the bills, if the shipment places sufficient funds in his hands. (*l*)

An agent who is authorized to draw on his principals for such moneys as he shall employ to make advances on merchandise consigned to them, is not thereby authorized to draw on them on account of goods of his own that he consigns to them. In regard to his own goods, he has the same right to draw which any other merchant would have to draw on a consignee. (*m*)

A bank is not bound to pay a bill of a customer if it has none of his funds when the bill is presented. And if it afterwards receive his funds on the same day, it is not bound to pay the bill when again presented by a notary after banking hours. Though it seems the bank ought to inform the notary of the receipt of funds. (*n*)

[(*i*) Benson v. Mathews, 7 La. R. 356.]
[(*k*) Bachellor v. Priest, 12 Pick. 399.]
[(*l*) Schimmelpennick v. Bayard, 1 Pet. S. C. R. 264.]
[(*m*) Schimmelpennick v. Bayard, 1 Pet. S. C. R. 264.]
[(*n*) Whitacre v. Bank of England, 1 Cromp. Mees. & R. 744.]

CHAP. IX.

Remedy on Bills or Notes.
Action by whom.
——— *when.*
——— *against whom.*
——— *Staying Proceedings.—On what Terms.*
Extinguishment.
Satisfaction.
Indulgence, &c.
What recoverable, Interest.
——— *Exchange—Re-exchange, &c.*
—In what form of Action.
Of making the Bill or Note Evidence on the Money Counts.
Of suing for the Consideration on which the Bill or Note was given.
——— *on guaranty of Payment.*
——— *on Bill or Note which is lost or destroyed.*
Form of special Count on Bill.
What Allegations in a special Count are necessary—Sufficient —Proper—Or Improper.

Upon a non-acceptance or nonpayment, the holder of a bill or note may sue all the persons liable to him on account of such non-acceptance or nonpayment; and he may sue them either at the same time or successively.

[No person, except the payee, can bring a suit on a bill or note, in his his own name, before the payee has endorsed it. (*a*)

[(*a*) Allen v. Ayers, 3 Pick. 298. Johnston being indebted to the plaintiffs, gave them a note signed by himself as principal, and Ayers as surety, payable to the Bedford Commercial Bank, in order that the plaintiffs might get the note discounted by the bank without endorsing it and pay themselves out of the proceeds. The bank, however, refused to discount the note. An action was brought by the plaintiffs in their own names on the note, the bank having refused to endorse it, or to allow them to sue on it in the name of the bank. It was held that the action would not lie. Allen v. Ayers, 3 Pick. 298.

Any person in possession of a bill or note endorsed in blank payable to bearer, is primâ facie the lawful holder, and entitled to sue on it. If the defendant deny that the plaintiff is the lawful holder, the burden of proof is on the defendant. (*b*)

Where a bill or note is endorsed in blank, and passed to a partnership, it may be filled out to one partner and he may sue upon it in his own name. (*c*)

But the mere possession of an unendorsed note is not sufficient evidence of authority to bring a suit on it for the payee. (*d*)

Though an administrator appointed in one State cannot bring a suit in another as administrator, on a note payable to his intestate, yet if the note be endorsed by the intestate, the administrator can sue on it in his own name as endorsee in the latter State. (*e*)

So on a bill or note held by his intestate, payable to bearer, the administrator may maintain an action in any state in his own name as bearer. (*f*)

On a bill or note payable to bearer, the executor may sue in the state in which he was appointed, either as executor or in his own name, without stating his capacity. (*g*)

Proof that another person had been interested in a bill or note jointly with the plaintiff, will not defeat the plaintiff's action, the presumption being that the other person has transferred his interest to the plaintiff. (*h*)

[(*b*) Murray v. Judah, 6 Cowen, 484; Dean v. Hewit, 5 Wend. 257. See also Bolton v. Harrod, 9 Martin, 326.]

[(*c*) Lovell sued Evertson as endorser of a note. The endorsement was in blank and filled up at the trial in the C. Pleas, payable to the plaintiff. It was proved at the trial that the note was endorsed and delivered for the benefit of Thomas Lovell and Co. and the plaintiff was nonsuited. On error, Per Curiam. "The note being endorsed in blank, the owner had a right to fill it up with what name he pleased, and the person whose name is so inserted, will be deemed on record as the legal owner, and if not so in fact, he could sue as trustee for the persons having the real interest. But the defendant could have no concern with that question. He was responsible to the person whose name was so inserted in the blank endorsement." Judgment reversed. Lovell v. Evertson, 11 Johns. R. 52.]

[(*d*) Parham v. Murphee, 16 Martin, 355.]

[(*e*) Barrett v. Barrett, 8 Greenl. 353.]

[(*f*) Robinson v. Vincent, 9 Wend. 425.]

[(*g*) Brooks v. Floyd, 2 McCord, 364.]

[(*h*) Murray v. Judah, 6 Cowen, 484.]

So in an action on a bill by the drawer against the acceptor, it is not sufficient to defeat the action, to show a declaration to another action on the same bill, in the name of the plaintiff and another, as it did not appear that the plaintiff would have prevailed in that action, or that the plaintiff had not since become the sole holder. (*i*)

The pledgee of a bill or note to whom it has been endorsed, may maintain an action upon it, against any of the prior parties. (*k*)

So the agent of the owner of a bill or note, where it is payable to bearer or endorsed in blank, may sue on it in his own name. The defendant cannot object the plaintiff's want of interest. (*l*)

But where a bank had given up to the maker a note which was endorsed in blank, but under such circumstances that the court considered the bank's interest in it and right to sue on it as still subsisting; it was held that the cashier of the bank could not maintain an action upon the note in his own name, without proof that the note was transferred to him by the bank, or that he sued by direction of the bank. (*m*)

[(*i*) Dabbs v. Humphrey, 4 Moore & Scott, 285.]

[(*k*) Bowman v. Wood, 15 Mass. R. 535.]

[(*l*) Little v. Obrien, 9 Mass. R. 423; Sterling v. Marietta and Susquehanna Trading Company, 10 Serg. & Raw. 179; Mauran v. Lamb, 7 Cowen, 174; Drew v. Jacock's administrator, 2 Murphy, 138; Banks v. Elstin, 15 Martin, 291.

Thatcher v. Winslow, 5 Mason, 58, is contra. In this case the evidence proving that the plaintiff was merely the agent of the party who owned the note in suit, though suing with his consent, Story J. said he took it not to be "competent for a mere agent to maintain an action on a negotiable note in his hands, although it be with the consent of his principal;" and the plaintiff discontinued his suit. This opinion, which was given at the trial of the case before a jury, seems not to coincide with the current of authorities in this country. As the defendant cannot be injured by a duly authorized agent's suing in his own name, no reason is perceived why an action in this form should not be permitted. As it regards the parties whose names are on the note, the agent has all the powers of the holder of the note, can receive the money, and discharge the demand. They are not at all affected by his obligation to account to his principal for his proceedings. The defendant in an action brought by an agent solely for the benefit of his principal would be entitled to the same defence as if the action was brought in the name of the principal.

[(*m*) Olcott v. Rathbone, 5 Wend. 490. Marcy J. in giving the opinion of the court, says, "It is not as agent, but as holder or assignee,

If the holder of a note endorse it in blank, and pledge it as collateral security for a debt, he has still such an interest in it that he can negotiate it to a third person, who can bring an action on it in his own name as endorsee, while it is still in the hands of the pledgee, and maintain it by producing the note at the trial, the lien of the pledgee being previously discharged. (*n*)

Where a not is payable to A, "agent of B," a suit should be brought in A's name, not B's. (*o*)

So on a note payable to A "*as administrator*," it seems, he may sue in his own name. (*p*)

So the payee of a note, who is an officer and member of a company consisting of many persons, may sue in his own name, though his official character be stated in the note; and it is no defence that the defendant is a member of the same company. (*q*)

But where a bill was endorsed to the Treasurer of the Uni-

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that the plaintiff must show his right to maintain this suit. In point of fact, the note never was transferred or assigned to him. If he had the actual possession of it, the court would not entertain an inquiry into his right, unless there was some proof that he obtained the possession *mala fide*; but the difficulty is that the plaintiff has not the possession, nor the right to the note by reason of any interest he has in it."

[(*n*) Fisher v. Bradford, 7 Greenl. 29.]

[(*o*) Buffum brought a suit against the maker of a note, and styled himself in his writ, agent of the Providence Hat Manufacturing Company, and declared that the defendant, "for value received of the said company, promised the said Buffum, as agent thereof, to pay him," &c. to his damage in his said capacity, &c. By the Court. "The contract was with the agent personally, and his adding his character to his name in the writ and declaration, amounts only to a description of his person. Let the defendant be called." Buffum v. Chadwick, 8 Mass. R. 103. See also Coke v. Dickens, 4 Yerger, 29, S. P.

[(*p*) Gilman v. Horseley, 17 Martin, 661.]

[(*q*) Forrest, president of a commercial company consisting of four or five hundred members, sued Crossfield and Van Ness in his own name upon a note payable to Forrest, president of the commercial company, and taken on account of goods of the company sold by them. Van Ness was a partner in the commercial company. Marshall C. J. in giving the opinion of the court said, "The principle that a company cannot sue its members does not apply to this case; nor does the principle, that a partner cannot sue a partner on a partnership transaction, apply to any case where a note in writing is given for money, not to a firm, but to an individual member. The legal title is in Forrest, who recovers in his own name, as a trustee for the company." Van Ness v. Forrest, 8 Cranch, 30.]

ted States, it was held that an action might be brought upon it in the name of the United States. (*r*)

On a note payable to A. B. as treasurer of a corporation, "or his successor in office," a suit may be brought in the name of the corporation. (*s*)

Where several persons are jointly interested in a note made by one of them, payable to bearer, which has by their joint agreement been placed in the hands of a third person for collection, the person thus receiving it may maintain an action on it against the maker. (*t*)

A person who guaranties the payment of part of the amount due on a bill or note, can sue on it, and recover the whole amount, but for the balance beyond his guaranty, he is trustee for the parties entitled to it. (*u*)

A person to whom a bill or note is endorsed, though he has

[(*r*) A bill purchased by the United States was endorsed to Tucker, "treasurer of the United States," who received it in that capacity, for their account. Tucker endorsed the bill as treasurer to Willinks and Van Staphorst, who presented it for acceptance, and the bill being dishonored, returned it to the Secretary of the Treasury. In an action by the United States against an endorser of the bill, Livingston J. delivered the opinion of the court. "If it be generally true, that where a bill is endorsed to the agent of another for the use of his principal, an action cannot be maintained in the name of such principal, (on which point no opinion is given,) the government should form an exception to such rule.

"It is next said that the title of the United States was divested by Tucker's endorsing the bill to Willinks and Van Staphorst, which endorsement appeared upon the bill at the trial, and is still on it. The mere returning of this bill, by Willinks and Van Staphorst to the Secretary of the Treasury, is presumptive evidence of the former having only acted as agents or as bankers of the United States. But if this agency were not established, the opinion of the court would be the same. After an examination of the cases on this subject, (which cannot all of them be reconciled,) the court is of opinion, that if any person who endorses a bill to another, whether for value or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bonâ fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more endorsements in full subsequent to the one to him, without producing any receipt or endorsement back from either of such endorsees, whose names he may strike from the bill or not, as he thinks proper. Dugan v. The United States, 3 Wheat. R. 172. See also United States v. Barker, 1 Paine, 156.]

[(*s*) Trustees &c. in Levant v. Parks, 1 Fairf. 441.]

[(*t*) Smith v. Burton, 3 Verm. R. 233.]

[(*u*) Reid v. Turnival, 5 C. & P. 499.]

not credited his immediate endorser with it, or has debited it back to him on its being dishonored, may still sue any party prior to his immediate endorser. (*v*)

Where the payee of a note holds it for the benefit of another person who advances money upon it to the maker, the person beneficially interested in the note may sue on it in the name of the payee with the consent of the payee. (*w*)

The receivers or assignees of an insolvent bank, may sue as endorsees of a note endorsed in blank, and transferred to them by the bank. It is not necessary for them to set forth that they sue as receivers or assignees. (*x*)

When a person endorses a bill or note to another, and it afterwards comes back to the possession of the endorser, he will be presumed to be the rightful holder, and need not produce any receipt or re-endorsement or other evidence to show that he has paid it in order to maintain an action upon it. (*y*)

[(*v*) Bolton v. Harrod, 9 Martin, 326.]
[(*w*) Bank of Chenango v. Hyde, 4 Cowen, 567.]
[(*x*) Haxtun v. Bishop, 3 Wend. 13.]
[(*y*) See Dugan v. The United States, supra; United States v. Barker, 1 Paine, 156; Norris v. Badger, 6 Cowen, 449; Brinkley v. Going, 1 Breese, 288; Welch v. Lindo, 7 Cranch, 159, is contra.

Bowie, use of Ladd v. Duvall, 1 Gill & Johns. 175. This was an action brought in the name of Bowie the payee of a note against Duvall the maker, for the use of John H. Ladd & Co. The note had had the following endorsement upon it, "I assign the within note for value received, to John H. Ladd & Co. Washington Bowie," which was erased just before the jury was empannelled. There was no evidence that Bowie, the legal plaintiff, had ever had possession of the note since the bringing of the action, and the report does not show whether suit was brought with his consent or not. The Court of Appeals of Maryland held that the action could not be maintained. Archer J. who delivered the opinion of the court, considered that Bowie was not the holder of the note, that the title to it was transferred to Ladd & Co. by the endorsement, and that the action should have been brought in their name.

It is held in Louisiana that where a person has endorsed and passed away a bill or note, he cannot afterwards sue upon it, without a re-endorsement to him, or proof that he has paid it to a subsequent endorsee. Arnold v. Bureau, 7 Martin, 287; Robson v. Earley, 13 Martin, 373; Dicks v. Cash, 18 Martin, 45. And in a suit by the payee against the maker of a note, the court refused to allow the plaintiff to strike out a full endorsement made by himself to another person. Robson v. Earley, 13 Martin, 373.

But in such a case the plaintiff may show that the person to whom the note is endorsed, was his agent or attorney for collecting the note,

It is held in Louisiana, that where the payee of a note has endorsed it to another person, an action cannot be brought on it in the name of the payee for the use of the endorsee, the legal as well as the equitable interest in the note being vested in the endorsee. (*z*)

The endorsee of a negotiable note cannot bring a suit upon it in the name of an endorser without his consent, though he may with his consent. But the assignee of a note not negotiable may bring an action upon it in the name of the payee. (*a*)

If the payee of a bill or note sell it without endorsing it, this is a sufficient authority to the purchaser to bring a suit on it, in the payee's name; and a release of the action by the nominal plaintiff is void. (*b*)

If the holder of a note after commencing an action on it, endorses it over to another person, it is held that the action can no longer be maintained. (*c*)

Whether the *bonâ fide* holder of a note can sue in the name of a fictitious person seems in one case to be considered doubtful. If the real holder of a note bring a suit in the name of

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and may then maintain the action. Hyde v. Groce, 19 Martin, 572; Perry v. Gerbeau, 17 Martin, 14.

But where a person endorses a note in blank, and it afterwards comes to his possession, he can maintain a suit on it, without any re-endorsement. Sprigg v. Curry, 19 Martin, 253; Gabaroche v. Hebert, 19 Martin, 526; Bell v. Norwood, 7 La. R. 95; Barbarin v. Daniels, 7 La. R. 479. So in Maryland. Kiersted v. Rogers, 6 Har. & John. 232.]

[(*z*) Moore v. Maxwell, 14 Martin, 249.]

[(*a*) Mosher v. Allen, 16 Mass. R. 451; Ware v. Key, 2 M'Cord, 373; Gray v. Wood, 1 Har. & John. 328.

Waggoner v. Colvin, 11 Wendell, 27. This was an action by the endorsee of a note against his endorser. A plea that before the commencement of the suit the plaintiff transferred the note to a third person, who since then had been and continued to be the true and lawful owner and possessor of the note, was held to be a bar to the recovery. But the court said if the suit was brought by the holders in the name of the plaintiff, or for their benefit, that fact should be replied, and it would be a good answer to the plea.]

[(*b*) Burton v. Dees, 4 Yerger, 4; S. P. Pease v. Hirst, 10 B. & C. 123; S. C. 5 M. & R. 88; Titcomb v. Thomas, 5 Greenl. 282; Amherst Academy v. Cowles, 6 Pick. 427.]

[(*c*) Lee v. Jilson, 9 Conn. 94. The court in this case consider the naked question of the effect of a transfer of a note by endorsement pending a suit upon it, and waive the inquiry as to what would have been the effect on the action of an agreement made at the time of the transfer to prosecute the action in the name of the plaintiff.]

a third person instead of his own, it is a circumstance which, with others, may be left to the jury in judging of his good or bad faith. (*d*)

Where an action is brought in the name of the endorsee of a note, without his knowledge or consent, the action may be maintained if he subsequently assent to it and carries it on, even if he has no interest in the note, but is a mere trustee for the endorser. (*e*)]

An endorser, an acceptor for the honor of an endorser or drawer, or the (1) drawer, is, after payment by him, holder; but he holds in his original capacity, not as upon a transfer from the person he has paid.

So, the bail of any of the parties who are sued, or (2) any persons who pay the bill or note on account of any of the par-

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[(*d*) Ogilby v. Wallace, 2 Hall, 553.]

[(*e*) Marr v. Plummer, 3 Greenl. 73.]

(1) Louviere v. Laubrey, 10 Mod. 36. The plaintiff drew a bill upon the defendant, payable to order, which the defendant accepted, but afterwards refused to pay; upon this the bill was endorsed to the plaintiff, and the question was, Whether he could maintain an action as endorsee: and, per Parker C. J., "upon evidence that he had effects in the hands of the defendant enough to answer the bill, and consequently that the acceptance was not upon the honor of the plaintiff, the action is well brought, but if there were no effects the action would not lie;" and the plaintiff recovered.

Symonds v. Parminter, 1 Wils. 185. 4 Bro. Parl. Cas. 604. The plaintiff drew a bill upon the defendant to the order of Cleer and Co., which the defendant accepted, but did not pay; the plaintiff paid it, and brought this action. The declaration stated that the plaintiff drew the bill; that the defendant accepted it, but did not pay it; that the plaintiff became liable, and paid it; by reason whereof, the defendant became liable and promised. The defendant demurred, and afterwards moved in arrest of judgment, and contended that the action would not lie; but the Court, after two arguments upon the demurrer, and one on the motion in arrest of judgment, were of opinion that it would, and judgment was given for the plaintiff. The defendant brought a writ of error in parliament, but did not appear at the bar to support it, and the judgment was affirmed.

[See also Alvord v. Cooper, 9 Wend. 323.]

(2) Mertens v. Winnington, Espinasse, 112. A bill was drawn by the defendant, and endorsed by Burton Forbes and Gregory; the plaintiff paid it for the honor of Burton Forbes and Gregory, and brought this action against the defendant as drawer; the defendant contended that a person who paid for the honor of one of the parties could only sue that party; but Lord Kenyon said, "he was to be considered as an endorsee paying full value for the bill," and he directed the jury to find for the plaintiff.

ties, become, on payment, holders; and they hold as upon a transfer from the person for whom they made the payment, not (3) as upon a transfer from the person they have paid.

And they stand, with respect to other parties to the bill or note, in the situation of the party for whom they made the payment; and, consequently, unless he could have sued upon the bill or note, they (4) (5) cannot.

[Therefore where the payee of a note, who holds a mortgage as security, passes the note to a third person and afterwards pays it himself, he holds it after payment in the same manner as if he had never transferred it, and his mortgage remains as valid as if the note had always remained his. (*f*)

And in order to enable an endorser who has taken up a bill or note, to maintain an action against any prior party, it is not

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(3) Hall v. Pitfield, B. R. Hil. 17 Geo. 2. The endorsee of a note sued the maker, and on payment by his bail permitted them to sue the endorser in his (the endorsee's) name, but the Court held that the payment by the bail discharged the endorser, and that the action could not be maintained.

(4) Bishop v. Hayward, 4 Term Rep. 470. The plaintiff declared upon a note payable to himself or order, endorsed by him to the defendant, and by the defendant endorsed back again to him, and obtained a verdict; a rule was granted to show cause why the judgment should not be arrested, on the ground that according to the statement in the declaration, the plaintiff would be liable, upon his endorsement, to pay the defendant the sum for which the verdict was given; and upon cause shown, the Court held the objection good; because, as the plaintiff had not stated it to be otherwise, his endorsement was to be considered as a legal existing endorsement: had any circumstances existed which exempted the plaintiff from answering upon his endorsement to the defendant, they should have been disclosed on the record. And see Louviere v. Laubrey, antè, p. 339, note (1).

(5) Ex parte Lambert, 3 Ves. 179. Adams and Co. drew two bills on Lane and Co., which the latter accepted. Lambert took up both these bills for the honor of the drawers. A commission of bankruptcy afterwards issued against the acceptors, and the drawers also failed: Lambert received a dividend upon the bills from the estate of the drawers, and claimed the balance from the estate of the acceptors; but it being proved that the drawers had no effects in the hands of the acceptors, and that the acceptances were for the accommodation of the drawers, the claim was rejected; and upon petition, the Lord Chancellor said that Lambert could not make a title stronger than that of the drawers, nor oust the assignees of the defence which they would have had against them. Petition dismissed.

[(*f*) Page v. Green, 6 Conn. 338.]

necessary for him to prove that he was duly notified of its dishonor, or was under a legal liability to take it up. (*g*)

Where A. draws a bill, directing the drawee to charge the amount to B., the drawee, if he accepts and pays the bill, cannot charge the amount to the drawer. But if B. was merely A.'s agent, it seems that A. would be liable. (*h*)

If one of several endorsers give a bond of indemnity to the sheriff for levying an execution in favor of the holder against the maker, on certain property as belonging to the maker, and is afterwards compelled to pay the bond, he can recover against a prior endorser. (*i*)

In order to enable an endorser who takes up a bill or note to maintain a suit on it against a prior party, it is not necessary that he should pay the note in money. If he pays it by giving his own note it is sufficient. (*k*)

It has been held that the drawer of a bill which is accepted, but not paid, cannot recover against the acceptor, without evidence that he has paid the bill. (*l*)

In such a case the endorsement of the payee being struck off the bill, has been held to furnish no evidence that the drawer has paid it. (*l*)

The liability of an endorser or surety on a bill or note, gives him no right of action against any prior party to the bill or note, until he has paid either the whole or a part of the bill or note. (*m*)

But where A. signed a note as principal, with another person as surety, for the accommodation of the payee, who negotiated it, and the surety paid the amount due on it to the holder, and laid the claim for the amount against A.'s estate, who

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[(*g*) Ellsworth v. Brewer, 11 Pick. 316.]
[(*h*) Bell v. Davidson, 3 Wash. C. C. R. 328.]
[(*i*) Tucker v. Praett, 4 Yerger, 553. Judgment being recovered on a note against the maker and endorsers, one of the endorsers gave a bond of indemnity to the sheriff for levying on property as belonging to the maker. Damages were recovered against the sheriff by the owner of the property levied upon, which the endorser who gave the indemnity paid. Held, that he could recover against a previous endorser. The case was considered the same as if he had satisfied the payment.]
[(*k*) Bullard v. Wilson, 17 Martin, 196.]
[(*l*) Thompson v. Flower, 13 Martin, 301.]
[(*m*) Hoyt v. Wilkins, 10 Pick. 31.]

died insolvent, and it was allowed by the commissioners of insolvency, it was held that A.'s administrators might sue the payee, it being considered that the note was paid by the surety as agent for A. or his administrators. (*n*)

If a bill or note be endorsed by A. to B., and back again by B. to A., A. [or his agent (*o*)] cannot sue B. upon the bill or note; because, A. would be liable over to B. upon his first endorsement. (5)

At least A. must not sue upon the bill or note without showing specially that his endorsement to B. raised no obligation from him to B. (4)

And if he allege that by his endorsement he appointed the contents to be paid to B., he cannot afterwards allege any thing which imports that the contents were not to be paid to B. (6)

[(*n*) Hoyt v. Wilkinson, 10 Pick. 31.
But see Shelmerdine v. Duffy, 16 Martin, 34.]

[(*o*) In an action against Herrick, the second endorser of a note, it was held that the defendant might prove that the plaintiff was the mere agent of the payees, the first endorsers, and that this was a complete defence to the action. Herrick v. Carman, 10 Johns. R. 224.

On another trial of this case it was proved that the maker of the note had given it to Carman & Co., the payees, with Herrick's name endorsed upon it, in payment for goods sold by them to him, which they had refused to let him have without security; and that the plaintiff, knowing these circumstances, bought the note of Carman & Co. But it was held that the action could not be maintained. Spencer J. delivered the opinion of the Court. "The plaintiff purchased the note with a full knowledge of all the facts in the case; his right therefore cannot be superior to that of Carman & Co. It does not appear that Herrick endorsed the note for the purpose of giving the maker credit with Carman & Co., or that he was informed of the use to which the maker meant to apply the note. In the absence of any proof to the contrary, we must intend that Herrick meant only to become the second endorser, with all the rights incident to the situation. He must have known, that though the first to endorse, his endorsement would be nugatory, unless preceded by that of the payees of the note." Herrick v. Carman, 12 Johns. R. 159.]

(6) Britten v. Webb, Hil. 1824. 2 Barn. & Cr. 483. Plaintiffs stated that they drew their bill upon Webb payable to their own order; that Webb accepted; that plaintiffs by their certain endorsement appointed the contents to be paid to defendant; and that defendant afterwards by his endorsement appointed the contents to be paid to plaintiffs; and plaintiffs averred that at the time of the drawing of the bill, and of defendant's endorsement, it was agreed between plaintiffs and defendant, that defendant's name should be upon the bill as a security to plaintiffs

An allegation that at the time of drawing and endorsing the bill, it was agreed between A. and B. that B.'s name should be endorsed on the bill or note, as a security to A. for a debt due from the acceptor or maker to A., and that A.'s endorsement to B. was without consideration, and only made that B. might re-endorse to A., will not be sufficient to enable A. to sue: for it gives A. no claim under the custom of merchants, shows no consideration for B.'s endorsement, and would let in parol evidence to prove a contract to pay for another's debt. (6)

[The acceptor of a bill who has paid it can bring no suit on the bill against the drawer; but the amount paid on the bill is a proper item of charge against the drawer in an account current. (*p*)]

An action (7) may be brought for non-acceptance before the expiration of the time limited by a bill for its payment. (*q*)

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for the due payment to plaintiffs of the sum in the bill by Webb, being a debt due from Webb to plaintiffs; that the bill was endorsed by defendant under that agreement and for that purpose only; that plaintiffs took it in satisfaction of the debt from Webb upon the faith that defendant would so endorse it; and that the endorsement by plaintiffs to defendant was without consideration from defendant to plaintiffs, and for the purpose only of procuring defendant's endorsement, and making the bill negotiable. On demurrer, the Court held these averments did not entitle plaintiff to sue; they were at variance with the allegation, that plaintiffs appointed the sum of money, mentioned in the bill, to be paid to defendant, and gave plaintiffs no right to sue upon the usage and custom of merchants; and to give plaintiffs a right to sue exclusively of such usage, they were bound to state a consideration for defendant's promise, which they had not done.

[(*p*) Bell v. Norwood, 7 La. R. 95.]

(7) Bright v. Purrier, Bull. Nisi Prius, 269. A foreign bill, payable 120 days after sight, was presented for acceptance, but acceptance being refused, the holder brought an action immediately against the drawer; the defendant objected that he was not liable till the expiration of the 120 days, and offered to call witnesses to prove that such was the custom of merchants; but Lord Mansfield said the law was clearly otherwise, and refused to hear the evidence; so the plaintiff recovered.

Milford v. Mayor, Dougl. 55. The defendant drew a bill of exchange, which the drawee refused to accept, upon which the plaintiff arrested him before the bill became due; these facts appearing upon the affidavit to hold to bail, a rule was obtained to show cause why the defendant should not be discharged; but upon showing cause, Buller J. said, "it is settled that if a bill is not accepted, an action will lie immediately against the drawer, because his undertaking that the drawee

And such action may be brought against an (8) endorser, as well as against the drawer. (*q*)

[In Louisiana, if an endorser of a bill be sued on the protest for non-acceptance, in order to compel him to give security, and afterwards on the protest for non-payment, if the plaintiff obtains judgment in the latter suit, he cannot recover costs in the former, but the petition in the former case must be dismissed with costs. (*r*)

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shall give him credit is not performed; there have been actions of this sort;" and Willes and Ashhurst Js. concurring, the rule was discharged.

[(*q*) The law as stated in the text is fully recognised in the United States. The right of action of the holder of a bill is complete upon giving notice of the non-acceptance, he is under no obligation to present for payment; and this right is not lost by a neglect to present for payment, or to give notice of the non-payment. Mason v. Franklin, antè, p. 210; Robinson v. Ames, 20 Johns. R. 146; Winthrop v. Pepoon, 1 Bay, 468; Watson v. Loring, 3 Mass. R. 557; Weldon v. Buck, 4 Johns. R. 144; Miller v. Hackley, 5 Johns. R. 375; Sterry v. Robinson, 1 Day, 11; Taan v. Le Gaux, Yeates, 204; Wild v. Bank of Passamaquoddy, 4 Mason, 505; Morgan v. Towles, 8 Martin, 730.

In an action against the endorser of a bill protested for non-acceptance and non-payment, it appeared that he had been notified of the non-acceptance, but not of the non-payment. The defendant's counsel contended that although a right of action accrued on the non-acceptance, yet that it was merged in the new right of action arising on the protest for non-payment, and that this new right was lost by the neglect of notice. By the Court. "When acceptance is refused by the drawee, a right of action accrues to the holder after due notice. He is not bound to demand payment at the time the bill falls due, nor to protest for non-payment, nor to retain the bill for that purpose; but he may bring an action against all parties liable, immediately on the refusal of the drawee to accept." Lenox v. Cook, 8 Mass. R. 460. In France "le porteur n'est dispensé du protêt faute de paiement, ne par le protêt faute d'acceptation," &c. Code de Com. L. 1. T. 8. art. 163.]

(8) Ballingalls v. Gloster, 3 East's Rep. 481. John Gloster drew a bill on Jackson, payable to Anthony Gloster's order, and the latter endorsed it to the plaintiffs. Jackson refused acceptance, on which the plaintiffs immediately sued Anthony Gloster, without waiting until the bill which was drawn at ninety days' sight, would have been due. The plaintiffs had a verdict, with liberty to the defendant to move for a nonsuit. On rule nisi accordingly, it was urged that an endorser stood in a situation different from that of a drawer; and that although a drawer might be sued immediately on non-acceptance, an endorser could not until the expiration of the time limited for the payment of the bill; but the Court was clear that the case of an endorser was not distinguishable from that of a drawer, and that every endorser was a new drawer. Rule discharged.

[(*r*) Bolton v. Harrod, 10 Martin, 115. The practice of bringing a suit for security only on the non-acceptance of a bill, is, we believe,

After a bill or note has been duly presented for payment at a reasonable hour on the day it becomes due, an action may be brought against the acceptor or maker on the same day. (*s*)

But an action cannot be brought on the same day before a presentment has been made. (*s*)

So an action may be brought against the enderser of a bill or note on the day it becomes payable, after a presentment to the drawee or maker, and notice to the endorser. (*t*)

But it has been decided in New York, that an action brought against the maker of a note, on the last day of grace, after a presentment and refusal, was premature and could not be supported, the maker having the whole day for payment. (*u*)

An action brought against an endorser before notice is sent him, cannot be maintained, although notice is afterwards seasonably given him. (*v*)

But judgment against the holder in such an action is no bar

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not known in any of the other States besides Louisiana. The decision stated in the text has therefore no application in the other States.]

[(*s*) Greeley v. Thurston, 4 Greenl. 478. In this case the action, which was against the maker of a note, had been commenced on the last day of grace, between four and five in the afternoon, no demand of payment having been made on him. The Court thought the action premature, and the plaintiffs were nonsuited.

See also Wilson v. Williman, 1 Nott. & M'Cord, 440; Osburne v. Moncure, 3 Wend. 170.]

[(*t*) Shed v. Brett, 1 Pick. 401.]

[(*u*) Osburne v. Moncure, 3 Wend. 170.]

[(*v*) New England Bank v. Lewis, 2 Pick. 125. In an action against the endorsers of a note, it appeared that a notary made a seasonable demand on the maker, and afterwards on the same day, but after this suit was brought, notified the endorsers. All the parties lived in Boston. After a verdict for the defendants, Parker C. J. in giving the opinion of the Court, said, "That the notice was not sufficient for the purposes of this action, because it was not given until after the action was commenced. Where the endorser lives in a different town from the holder, the law considers putting the notice seasonably into the post-office as using due diligence, or as a constructive notice. Here all the parties lived in the same town, and proper notice might have been given by a minute's walk, and to commence the action before giving such notice was not using due diligence." Afterwards the plaintiff's counsel said, "If it will make any difference, we can show that the notice was in the hands of the notary before the writ was in the hands of the officer." C. J. "That question was put in our discussions, and it was thought that it would make no difference."

In a previous case the Court seem to have been of opinion, that an action brought before the notice was put into the post-office, might be maintained." Stanton v. Blossom, 14 Mass. R. 116.]

to another action brought by him against the endorser, after the notice is given. (*w*)

An action may be brought against an endorser as soon as notice to him is put into the post-office, before he can have received it by the regular course of the mail. (*x*)

On a note for money payable on demand, a right of action accrues immediately; and therefore such a note is barred by the Statute of Limitations in six years from its date. (*y*)

Where a note is payable by instalments at different times, an action may be maintained for each instalment as soon as it falls due. (*z*)

So where interest on a note is payable annually, an action lies for each year's interest immediately upon its falling due, and before the principal becomes due. (*a*)]

All the antecedent parties are liable to the holder on account of a non-acceptance or nonpayment; and if the bill or note were transferred to him, for a precedent consideration, by delivery, the person who delivered it is still liable to be sued for such consideration. (*b*)

[(*w*) New England Bank v. Lewis, 8 Pick. 113. Wilde J. in giving the opinion of the Court said, "As the merits of the present suit were necessarily excluded in the former action, because no cause of action had then accrued, the judgment in that action is no bar."]

[(*x*) Parker C. J. delivered the opinion of the Court. "Another objection is that the action was commenced too soon. By course of mail the notice could not have reached the defendant until after the writ was served. The putting the letter into the post-office is notice in itself. The receipt of notice, or time for it to be received is not necessary." Shed v. Brett, 1 Pick. 401.

But in a case in Pennsylvania, it was held that an action brought against an endorser, after notice to him was sent to the post-office, but before it could have reached him by the regular course of the mail, could not be maintained; the Court being of opinion that a letter put into the post-office could be considered notice only from the time at which it ought to be received by the regular course of mail. Smith v. The Bank of Washington, 5 Serg. & Raw. 318.]

[(*y*) Little v. Blunt, 9 Pick. 488.]

[(*z*) Tucker v. Randall, 2 Mass. R. 283.]

[(*a*) Greenleaf v. Kellogg, 2 Mass. R. 568; Cooley v. Rose, 3 Mass. R. 221.]

[(*b*) In Virginia and Kentucky the holder of a note cannot sue his endorser, unless he has previously brought a suit against the maker if solvent. But if the maker is insolvent, so that a suit against him would be fruitless, an action may be brought against the endorser without first suing the maker. Clark v. Young, 1 Cranch, 181; Yeaton v. The Bank of Alexandria, 5 Cranch, 49; Violett v. Patton, 5 Cranch, 142; Saun-

Where the acceptor of a bill resides in a different place from that in which it is payable, the person on whose ac-

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ders v. Marshall, 4 Hen. & Mun. 455; Bank of the United States v. Weisiger, 2 Pet. Sup. C. R. 331.

If the maker is not insolvent, and no suit has been brought against him, the endorser is not liable, though the maker is out of the reach of the process of the Court, and the endorser has been secured by the maker for his endorsement. Dulany v. Hodgkin, 5 Cranch, 333.

In the same States no action at law can be maintained by an endorsee against a remote endorser. Dunlop v. Harris, 5 Call, 16; Hoop v. Wilson, 5 Call, 61; Bank of the United States v. Weisiger, 2 Pet. Sup. C. R. 331; Mandeville v. Riddle, 1 Cranch, 290; Harris v. Johnston, 3 Cranch, 311. The case of Dunlop v. Silver, 1 Cranch, 367, Appendix, is contra.

But the holder may recover against a remote endorser, by a suit in equity. Harris v. Johnston, 3 Cranch, 311; Riddle v. Mandeville, 5 Cranch, 322; Bank of the United States v. Weisiger, 2 Pet. Sup. C. R. 331.

In these States every reasonable effort must be made to recover of the maker of the note, before a suit can be brought against the endorser. Bank of the United States v. Weisiger, 2 Pet. S. C. R. 331.

But not taking out a *fi. fa.* against the maker until nineteen days after judgment, and not putting it into the marshal's hands until thirty-six days after the judgment, is not such a want of diligence as will discharge the endorser. Bank of the United States v. Weisiger, 2 Pet. S. C. R. 331.

In case of a discharge of the maker under an insolvent law, it is not necessary to take out execution against him, in order to establish a right of action against the endorser. Bank of the United States v. Weisiger, 2 Pet. S. C. R. 331.

The maker of a note being imprisoned in an action against him by the holder, but not in execution, by process from a Court of the United States, it was held that an agreement by the plaintiff that the oath of an insolvent debtor might be administered to the debtor, without the thirty days' previous confinement, to the same effect as if the imprisonment had taken place, did not discharge the endorser, it not appearing that he was injured by this waiver of the imprisonment. Bank of the United States v. Weisiger, 2 Pet. Sup. C. R. 331.

The maker of a note in Kentucky being imprisoned on a judgment obtained against him in the Circuit Court of the United States, two justices of the peace, claiming to proceed under the law of Kentucky, ordered his discharge. Under this authority the jailor permitted him to leave the prison. It was held, that the jailor thereby rendered himself and his securities liable for an escape; and that the holder of the note who had neglected to proceed against the jailor and his securities, had, in consequence, lost his claim against the endorser. Bank of the United States v. Tyler, 4 Pet. 366. The following are stated by Baldwin J. in this case to be the principles of the Kentucky law on the rights and duties of holders of notes in regard to endorsers. "That the assignee is not bound to run a race against time, or to use extraordinary means; that he is not required to prosecute a drawer or obligor further than a man of ordinary prudence and diligence would do

count it is drawn is not liable to the acceptor for any loss accruing to him by the bankruptcy of parties to bills remitted by him to meet his acceptance. (*c*)

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in a case where he was solely and exclusively interested." But in order to bring himself within these rules, he must commence a suit against the drawer at the first term after the note becomes due, if a judgment could be obtained then. He must sue within such time before the term as will authorize him to procure judgment. After suit is brought he must prosecute it to judgment without delay, or giving time to the maker of the note. Though he is notoriously insolvent, and dies on the third day of the first term after the note become due, and no administration is taken out on his estate, the assignor is discharged, if no suit has been brought. After judgment, there must be the same diligence in pursuing the debtor's property by execution as in the commencement of the suit. There must be no delay in putting the execution into the hands of the sheriff, or in making sale of the property levied on; he must continue the process of execution until the property of the drawer is exhausted, and the sheriff returns *nulla bona* to the last execution; and after his insolvency is thus ascertained, a *capias ad satisfaciendum* must be taken for his body; and, if he is committed, the assignee must show what has become of the debtor, and how he has been discharged. If the debtor assigns his property, it must be sold. If property is taken on execution, and replevin bond given, the bond must be put in suit; if there is bail to the action, and the principal cannot be taken on a *capias ad satisfaciendum*, the bail must be pursued, and all incidental and collateral remedies, which may accrue to the assignee must be adopted and prosecuted; and that the discharge of the drawer by the insolvent act at the suit of a third person, will be no excuse for any relaxation in the diligence required to fix the assignor; who is suable only after the exhaustion of all legal means of obtaining payment." pp. 381, 382.

In an action in Virginia against the second endorser of a note, the record of a suit by the same plaintiff against the maker of a note of the same tenor, except that the plaintiff had declared on the transfer of the first endorser as being directly to himself, not naming the second endorser, was held inadmissible as evidence of a suit brought by him on the note in suit against the maker. Hooe v. Wilson, 5 Call, 61.

In Virginia it is not sufficient for the assignee of a note, in order to charge the assignor, merely to bring a suit against the maker, which fails on account of informality in the proceedings; but he must bring a sufficient suit. Bronaugh v. Scott, 5 Call, 78.

By the law of Kentucky (Feb. 1798) a joint action may be brought against the drawer and endorsers of a foreign bill. Crisson v. Williamson, 1 Marsh. R. 454.

A note discounted at a bank in Kentucky has the character of a foreign bill, and a joint action may be brought against the maker and endorsers. Johnson v. Bank of Kentucky, 5 Monroe, 119; Tuggle v. Adams, 3 Marsh. R. 430; Sanders v. Bank of Kentucky, 2 Marsh. R. 347; Bell v. Morehead, 3 Marsh. R. 158.

But merely making a note payable at a bank does not give it the character of a foreign bill. Jones v. Wood, 3 Marsh. R. 162.]

[(*c*) Forbes v. Eldridge, 9 Mass. R. 497. The defendant having con-

Where A. authorizes B. to draw upon certain persons in partnership to a certain amount, and the partnership being dissolved, B. draws a bill upon one of the partners, which is accepted and paid, B. is liable to the acceptor for the amount of the bill. (*d*)

Where A. signs the name of B. to a note without authority, A. may be sued on the note, the declaration alleging that he made it by the name of B. (*e*)

A promise to pay a note barred by the statute of limitations, enures to the benefit not only of him who is holder when the promise is made, but of every future holder. (*f*)

If the holder sue all the persons liable at the same time, it was at one time (9) supposed that the Court or a Judge would not stay proceedings in any one action but upon payment of the money recoverable in that, and the costs in such of the rest in which judgment had not been obtained; but it is

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signed a vessel to the plaintiffs in Dublin, his agents by his authority drew a bill on the plaintiffs, payable at sixty days' sight in London; the plaintiffs accepted the bill payable at Johnson and Co.'s, in London, and remitted bills to Johnson and Co. to reimburse them. These bills did not fall due until after the maturity of the first bill, and the parties to them became bankrupt before they became due. The plaintiffs sued the defendant to recover the loss upon these bills. But it was held that the action would not lie. The Court said, "The acceptor does not act as agent of the drawer of a bill. He accepts on his own terms and for his own convenience. Whether funds were placed in London to meet the acceptance at a profit or a loss to the plaintiffs, was no concern of the defendant's, and he cannot be liable for the result."]

[(*d*) Jennings and Roddy gave Watson a letter of credit on Penoyer and Co. saying in it, "Mr. Watson is authorized to value on you on our account, for ten thousand dollars." Penoyer and Co. having dissolved their partnership, Watson drew a bill on Penoyer alone, which Penoyer accepted and paid. It was held that Penoyer might maintain an action against Watson for the amount of the bill; as Jennings and Roddy were not liable, they only being liable on account of bills drawn on the partnership. Penoyer v. Watson, 16 Johns. R. 100.]

[(*e*) Grafton Bank v. Flanders, 4 N. H. R. 239.]

[(*f*) Pinkerton v. Bailey, 8 Wend. 600.]

(9) Golding v. Grace, Blackst. 749. The endorser of a bill obtained a rule nisi to stay proceedings on payment of the debt and the costs of the writ; the plaintiff insisted that he was entitled to be paid for drawing declarations against the defendant and the drawer; and it was agreed that if any were to be paid for, the plaintiff was entitled to be paid for both; but the Court held that the application to pay debt and costs was made so early, that the plaintiff was only entitled to the costs of the writ.

now settled that in the (10) case of a regular bill, where the acceptor is the proper person to provide for payment, he is the only person against whom the plaintiff is entitled to the costs of *all* the actions; and that each of the other parties is entitled to a stay of proceedings upon paying the debt and the costs in the action against him.

The maker of a note stands in this respect in the condition of the acceptor of a bill.

And where it appears that some of the actions are friendly and collusive, not to obtain payment, but to increase costs, it is probable the costs of those actions would not be included.

Though the owner may recover judgments in all the actions, he (11) can only once recover the sum payable by the bill or

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(10) Smith v. Woodcock, Same v. Dudley, 4 Term Rep. 691. The holder of a bill brought actions against the acceptor, the drawer, and two endorsers; the drawer and one of the endorsers obtained a rule nisi to stay proceedings against them on payment of the bill and costs of the actions against *them*; the plaintiff insisted that the costs of the other actions should be also paid: sed per cur. "that is only necessary where the application comes from the acceptor, who is the original defaulter, and against whom all the costs occasioned by his default may be recovered." Rule absolute.

[In a case in Massachusetts, where separate actions had been brought against the maker and endorser of a note; and judgment obtained against the endorser, which was afterwards satisfied, it was held that the action against the maker could not be maintained any longer, and judgment was given for the defendant for costs. Gilmore v. Carr, 2 Mass. R. 171. But see the remarks of Sewall J. upon this case in Porter v. Ingraham, 10 Mass. R. 88; and 1 Dane's Dig. 415.

See also Tarin v. Morris, 2 Dallas, 115.

In New Hampshire, the case of Gilmore v. Carr appears to be followed. In a case where several actions were commenced against several makers of a note, and judgment rendered in one of the actions was satisfied, judgment was given for the defendant in the other action. Farwell v. Hilliard, 3 N. H. R. 318.

These decisions seem very questionable in principle, for it is certainly very unjust that the plaintiff should be made to pay costs to the defendant, since he had a clear right of action when the suit was brought.

The holder of a note in New York brought two actions, one against the maker, the other against the endorser, at the same term. It was held that the plaintiff was entitled to the costs of both suits. Per Curiam. "The statute allowing a recovery of costs in one suit only, when several suits are brought upon the same instrument, does not apply to this case; but to cases in which separate suits are brought upon the same note or bond where one suit would have served." Austin v. Bemiss, 8 Johns. R. 275.]

(11) Exparte Wildman, 2 Ves. 115. per Lord Hardwicke, "In cases

note, and the costs; and if he reject a tender of such sum and costs, the (12) Court will make an order to restrain him from taking out execution.

If the holder at first sue some only of the persons liable, he may at any time before satisfaction sue all or any of the rest.

And the difference between extinguishment and satisfaction is to be remembered; the holder's claim upon a bill or note may be extinguished as to some parties, and remain entire as to others; if his claim be satisfied as to any, it is satisfied as to all.

[Mere delay by the holder of a bill or note to sue the acceptor or maker, does not affect the liability of an endorser, even if the endorser request him to sue the acceptor or maker. (*g*)

So the mere delay of the second endorser for a long time to take up a note, does not impair his right of action against the first endorser after taking it up. (*h*)]

Taking security of a higher description, as a bond or judg-

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of bills of exchange or promissory notes, where there is a drawer and endorser, perhaps more than one judgment is against all, but there can be but one satisfaction."

(12) Windham v. Withers, Stra. 515. The plaintiff having obtained judgments against the drawer and endorser of a note, the principal in one, and the costs in both, were offered him, which he refused; and the Court granted a rule to restrain him from taking out execution, and intimated that they would have punished him, had he taken out execution upon both judgments.

[In a suit against the bail of an endorser of a note, where a judgment against the maker had been paid, after judgment recovered against the endorser; judgment was given *pro forma* for the penalty of the recognizance, but the plaintiff was only entitled to levy for the costs of the original suit against the principal, and the costs of this suit. Wattles v. Laird, 9 Johns. R. 327.]

[(*g*) Powell v. Waters, 17 Johns. R. 176.

In an action against the endorser of a note, it was proved that after the note became due, he requested the holder to sue the maker, which was not done; that the amount might then have been collected of the maker, who afterwards became insolvent. The Court appeared to think that the endorser was not discharged by this neglect; and said, "Though in the nature of a surety, he is answerable upon an independent contract, and it is his duty to take up the bill when dishonored." Trimble v. Thorne, 16 Johns. R. 152.

See also Sterling v. Marietta and Susquehanna Trading Co. 11 Serg. & R. 179.]

[(*h*) Stafford v. Yates, 18 Johns. R. 327.]

ment, for the money due upon a bill or note, extinguishes the holder's claim upon the bill or note, against the party giving that security (13): it does not satisfy it.

So, obtaining judgment on a bill or note is an extinguishment as between the parties, not a satisfaction.

But taking a warrant of attorney to enter up judgment, is not, unless judgment be actually entered up, even an extinguishment. (14)

[Taking a mortgage or other collateral security from a party to a bill or note, is no extinguishment as to him, or satisfaction as to any other party to the instrument, even if it be afterwards given up. (*i*)]

Obtaining (15) a judgment is no satisfaction, even as to

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(13) Bac. Abr. tit. Extinguishment, (D), vol. iii. p. 106.

(14) Norris v. Aylett, 2 Campb. 329. [See also Mohawk Bank v. Vanhorne, 7 Wend. 117.]

[(*i*) Ligget v. The Bank of Pennsylvania, 7 Serg. & Raw. 218. See Sheldon v. Ackley, post.

Taking the bond of a third person for the amount due upon a note, does not discharge the maker or endorser, unless it is so agreed. The presumption is that it was taken as collateral security. Proceeding to judgment on the bond will not discharge the note. Sterling v. Marietta & Susquehanna Trading Co. 11 Serg. & Raw. 179.

Taking from the maker of an endorsed note a new note on time and a mortgage as security for the first note and other demands, does not discharge the endorser, unless there is an agreement not to sue the maker on the first note. Ripley v. Greenleaf, 2 Verm. R. 129.

Where a mortgage is given as security for a note, the holder may sue on the note without resorting to his mortgage. Croghan v. Conrad, 11 Martin, 555.

The holder of a bill protested for non-acceptance, received security from the drawer; but he afterwards gave up the security on learning that a large part, and probably the whole, of the money would be paid by the drawee. The greater part of the money was paid at maturity. In an action against an endorser for the remainder, the Court said, "That as the holder had not given time to the drawer, but had only taken further security, the endorser was not discharged: that it was no more than if the holder had commenced an action, and attached the goods of a party to a bill or note, in which case another party would not be discharged, even though the creditor should discontinue that suit, or release the attachment." Hurd v. Little, 12 Mass. R. 502.]

(16) Claxton v. Swift, 2 Show. 441. 494. Lutw. 882. To an action against the endorser of a bill, the defendant pleaded that the plaintiff had recovered a judgment against the drawer, and that the judgment was still in force; and upon demurrer, the Court of King's Bench held the plea good, but the Court of Exchequer Chamber held otherwise, and the judgment was reversed.

the parties subsequent to him against whom the judgment is obtained.

[If an action against the maker of a note be brought in the name of one only of two persons jointly interested in the note; they are not thereby estopped from maintaining a joint action against a guarantor or endorser. (*k*)

A judgment against one of two joint makers of a note, has been held to be no bar to a joint action against both. (*l*)

Where a note expressed to be for a single sum, is given as security for the payment of instalments becoming due from time to time; a judgment on the note for the amount of some of the instalments is a bar to any future action on it. (*m*)]

The actual taking (16) of a man in execution, and discharging him upon a letter of license, is no satisfaction as to any of the antecedent parties.

[(*k*) Cobb v. Little, 2 Greenleaf, 261.]

[(*l*) In a suit against Mandeville and Jamesson upon a note declared on as having been made by them trading under the name of Jamesson, Mandeville pleaded in bar a judgment against Jamesson upon this note in favor of the plaintiff. On demurrer the plea was held bad. Sheehy v. Mandeville, 6 Cranch, 253.]

[(*m*) Siddall v. Rawcliffe, 1 M. & Rob. 263. A note for 100*l.* payable on demand, appearing to be for that sum absolutely, was in fact given as security for instalments that might become due from one of the makers as a member of a club. Instalments being in arrears to the amount of 28*l.* an action was commenced on the note, and a cognovit given by one of the parties to the note for that amount, which was subsequently paid. Held that this extinguished the note, and that an action could not be brought upon it, on subsequent instalments becoming due.]

(16) Hayling v. Mulhall, Blackst. 1235. A bill was endorsed by Sheridan to Boon, and by him to the plaintiff: he sued Boon, and took him in execution, but discharged him upon a letter of license; he then sued Sheridan, for whom the defendant became bail; and upon an action against the defendant, *he* contended that the debt was satisfied by the imprisonment of Boon: but the Court was clear it was not, and Mulhall was obliged to pay the money.

[Committing the maker of a note on execution is no satisfaction of the note, and no bar to an action against an endorser. And where the goaler without authority released from confinement the maker of a note who had been committed, and received the amount of the judgment from a third person, and then tendered it to the assignee of the judgment, who refused to receive it, it was held that an action might still be maintained against an endorser. Porter v. Ingraham, 10 Mass. R. 88.]

In an action by the endorsee of a note against an endorser, it ap-

Nor (17) is it a satisfaction, that the defendant has been charged in execution on the bill or note, and discharged as an insolvent, unless as to the party at whose suit he was so charged: it is no bar to a claim against him upon the bill or note by a party from whom the former plaintiff recovered the amount.

[In an action against the maker of a note by an endorser who has paid it to A. the holder, it is no defence that the defendant at the time of the action brought is in jail on an execution in favor of A., on a judgment in a suit on the note. (*n*)

A discharge of one of two joint makers of a note, under an insolvent law, will not operate as a discharge of the other. (*o*)

Proving a bill or note under a commission of bankruptcy against one of the parties to it, does not discharge any of the other parties. (*p*)

A covenant by the payee of a note not to sue the maker during a limited time, is no bar to an action by the payee against the maker, and *a fortiori* is no bar to an action by an endorsee against the maker, although the endorsee receives the note when it is overdue. (*q*)

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peared that an officer having an execution obtained in a suit against the maker, took personal property of less value than the debt, but did not sell it, and afterwards relinquished the property to the debtor, and took his body; it was held that the endorser was still liable to the full amount of the note, without deducting the value of the property taken on the execution. Sheldon v. Ackley, 4 Day, 458.]

(17) M'Donald v. Bovington, 4 Term Rep. 825. A bill drawn by M'Donald on Bovington, was endorsed to Thompson, who charged Bovington in execution upon it; Bovington was discharged as an insolvent, and then Thompson sued M'Donald and recovered. M'Donald paid the bill, sued Bovington, and charged him in execution; and on a rule nisi to discharge him, and cause shown, it was urged that Bovington had satisfied the bill by being charged in execution at the suit of Thompson. Sed per Lord Kenyon, "nothing can be clearer than that he has not; it was a mere formal satisfaction as to Thompson, not like actual payment; and when M'Donald was obliged to pay the bill a new cause of action arose against the defendant by the payment, without regard to what passed in the former action;" and per Buller J., "the consequence would be, that because the drawer was obliged to pay the holder, the acceptor would be discharged without paying either." Rule discharged.

[(*n*) Cole v. Cushing, 8 Pick. 48.]
[(*o*) Tooker v. Bennett, 3 Cain. R. 3.]
[(*p*) Kenworthy v. Hopkins, 1 Johns. Cas. 107.]
[(*q*) Perkins v. Gilman, 8 Pick. 229.]

If a bank which holds a note, have, after it becomes payable, money of the maker deposited, and suffer the maker to draw it out; this does not discharge an endorser. (*r*)

Where a joint and several note signed by several persons, was given to a banking firm in order to give one of them credit with the firm, which note, afterwards, on some of the partners retiring, was passed to the new firm, who continued the business, without endorsement, it was held that all the parties on the note were liable in an action brought in the name of the payees, for a balance due from the principal to the new firm, notwithstanding the principal had had at one time a larger balance in the hands of the bankers than the amount of the note. (*s*)]

If a bill or note be mislaid, and an agent for one of the parties tender payment, on condition that the bill or note is delivered up, such tender is no satisfaction of the demand; and if the agent fail with the money in his hands before the bill or note is found, it will be no answer to an action upon the bill or note against the principal. (18)

But payment of interest shall cease from the time of such tender. (18)

[(*r*) Martin v. Mechanics' Bank, 6 Har. & John. 235. The Mechanics' Bank was holder of a bill accepted by the Woods, and endorsed by Martin the payee. The Woods, the acceptors, kept their cash account in the same bank. On the day when the bill became due, no balance was due to the acceptors on that account, but on the 20th of June after a balance was due to them on that account, exceeding the amount of the bill, which was afterwards drawn out by their check. The bill had passed as an item in the account between the plaintiffs and the acceptors. Held that this was not a payment of the bill, and that the endorser was still liable.]

[(*s*) Pease v. Hirst, 10 B. & C. 123; S. C. 5 M. & R. 88.]

(18) Dent v. Dunn, 3 Campb. 296. An executor deposited money with an agent to pay notes of the testator: plaintiff had some of the notes, but could not find them: the agent tendered him the money if he would give up the notes, but they could not be found, and the agent failed with the money in his hands: plaintiff afterwards found the notes, and brought this action. It was urged for defendant, that plaintiff ought to bear the loss; for, had he not mislaid the notes, they would have been paid. Sed per Lord Ellenborough, "here was only a tender, which could not extinguish the debt; plaintiff did nothing to make the stakeholder his agent; he continued defendant's agent:" verdict for plaintiff, but interest to the time of the tender only.

[If the payee of a dishonored bill, to whom it is remitted by the drawer in payment of a debt, return the first of the set to the drawer, requesting credit for the amount and a remittance; an action cannot after this be maintained against the drawer upon the second of the set, by an agent of the payee to whom he endorses it. The redelivering the bill to the drawer and desiring a remittance, operate as a legal extinguishment of the bill. (*t*)]

If the holder of a bill or note send it to the person who ought to pay it, not for immediate payment in money, but that he may give the holder credit in account, and order the payment at a distant place by that night's post; the bill or note is, as to the other parties, to be considered as honored as soon as the person to whom it is sent gives the holder credit for it. (19)

And it will make no difference though such person fail the

[(*t*) Ingraham v. Gibbs, 2 Dall. 134.]

(19) Gillard v. Wise, 5 Barn. & Cr. 134. 18th March plaintiff deposited with defendants in the Totness Bank 800*l.* at interest; 657*l.* was in notes of the Dartmouth bank: by the course of dealing between these two banks, the Totness bank sent the Dartmouth bank every morning all the Dartmouth notes they had received the preceding day, and the Dartmouth bank immediately entered them to the credit of the Totness bank, and re-issued them; every evening the Dartmouth bank did the same with the Totness notes they received, and an order was given every evening upon London for whatever was the balance of either house. On the morning of the 19th, defendants sent the 657*l.* to the Dartmouth bank: they entered the amount to defendants' credit and reissued the notes, but towards the close of the day they stopped payment, and they sent over that evening no Totness notes to defendants, nor any order upon London: defendants, therefore, insisted against plaintiff that, as between them, they were entitled to consider the 657*l.* notes as dishonored, and were not liable to pay plaintiff the amount: but on case and argument, the three judges of B. R. were of opinion, that as between plaintiff and defendants these notes were to be considered as honored; they were to be considered as presented for payment when the Dartmouth bank received them; and if defendants, by their course of dealing, instead of requiring payment were content to have credit only and defer payment, it was at their peril: had they employed a third person as their agent, actual payment would have been made; and if, for a like accommodation to themselves from the Dartmouth bank, they though fit to make the Dartmouth bank their agents, that was an arrangement between the banks, which did not affect plaintiff. He was entitled to recover, as if the defendants had received from the Dartmouth bank the full amount of the Dartmouth notes. Judgment for plaintiff.

same day, and do not order the payment by that night's post. (19).

(20) Discharging, or (21) giving time to any of the parties,

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(20) Ex parte Smith, 3 Bro. C. C. 1. Lewis and Potter endorsed certain bills and notes to Esdaile, and became bankrupt. Esdaile proved the amount of the bills and notes under their commission, and afterwards received a composition from the acceptors of the bills, and the makers of the notes, and gave them a full discharge, without the knowledge of the assignees of Lewis and Potter. On petition by the assignees to have the debt in respect of the bills and notes expunged, the Chancellor held that, by discharging the acceptors and makers, without the consent of the endorser, the latter was discharged also. To the same effect is the case of Ex parte Wilson, 11 Ves. 410. See also Smith v. Knox, 3 Esp. N. P. C. 46.

[See also M'Fadden v. Parker, 4 Dallas, 275.

Releasing one of two joint and several makers of a note, discharges the endorser. Abat v. Holmes, 3 Miller, 351.]

(21) English v. Darley, 2 Bos. and Pull. 61. The holder of a bill sued the endorser and acceptor, and took out execution against the acceptor, but received 100*l.* from him, and took his bond and warrant of attorney for payment of the remainder by instalments, with interest and costs, except only a nominal sum to enable him to support actions against the other parties: he then brought on to trial this action against the endorser. Lord Eldon thought that the bargain to give indulgence to the acceptor was a bar, and nonsuited the plaintiff; and, on motion for a new trial, the Court was clear that the nonsuit was right; because giving time to the acceptor was a pledge that he should have time from all the other parties, and the holder had no right to give such pledge and yet hold the other parties liable.

Gould v. Robson, 8 East's Rep. 576. The holder of a bill, upon its becoming due, received part payment from the acceptor, and took a bill from him at a future short date for the remainder, and agreed to keep the original bill in his hands in the interim, as a security. He now sued the defendants as endorsers, and this was relied upon as a defence. Lord Ellenborough thought at the trial, that it did not amount to a giving time to the acceptor, and the plaintiff had a verdict; but upon motion for a new trial, he and the Court were satisfied that it did, and a nonsuit was entered.

Laxton v. Peat, 2 Campb. N. P. C. 185. Endorsee of a bill against the acceptor. It appeared that the bill had been accepted for the accommodation of the drawer, which circumstance was known to the plaintiff, who gave value for the bill. When the bill became due, the plaintiff received part payment from the drawer and gave him time to pay the remainder, without the concurrence of the defendant. Lord Ellenborough held, that this being an accommodation bill, within the knowledge of all the parties, the acceptor could only be considered as a surety for the drawer; and in the case of simple contracts, the surety is discharged by time being given, without his concurrence, to the principal. Nonsuit. But see as to this case antè, p. 191, note (89).

See Rees v. Berrington, 2 Ves. jun. 540. Rees became surety in a joint and several bond conditioned for the payment to the obligee, of a certain sum with interest, by two instalments; the first on the 31st of

is a discharge of every other party, who, upon paying the bill or note, would be entitled to sue the party to whom such discharge or time has been given; (u)

December, 1789, and the second on the 31st of December, 1790. In September, 1790, the whole sum being unpaid, the obligee took promissory notes from the principal obligor, for payment of the debt by instalments at extended periods, which notes were afterwards exchanged for others payable at more distant days. This arrangement was without the knowledge of Rees. The principal obligor afterwards became bankrupt: and the executor of the obligee sued Rees, the surety. And on a bill filed for an injunction, the Chancellor held, that the surety was discharged by this indulgence having been given without his consent to the principal. See also 2 Bos. and Pul. 62.

[(u) The law as stated in the text is recognised in many cases in the United States. Moodie v. Morrall, 1 S. Car. R. 367; Sharpe v. Bingley, 1 S. Car. R. 373; Scarborough v. Harris, 1 Bay, 177; Hubbly v. Brown, 16 Johns. R. 70; Wood v. Jefferson County Bank, 9 Cowen, 190; Nolte & al. v. Their Creditors, 19 Martin, 9.

The holder of a bill agreed to continue an action which had been brought against the drawer, for one term, in consideration of the drawer's allowing a person confined in prison at his suit, to leave the jail limits and attend court as a witness in another suit for the plaintiff.—It was held that this agreement to continue the suit was giving time to the defendant, and discharged the endorser. Bank of the United States v. Hatch, 6 Pet. S. C. R. 250.

So where the holder of a note procured a confession of judgment from the maker, and granted him a *cessat executio* during six months; when, had he regularly brought a suit to the term at which the judgment was confessed, the execution would have been delayed but three months; it was held that the endorser was discharged. Yancey v. Littlejohn, 2 Hawks, 525.

Where the holder of a note in Louisiana appears at the *concurso* of the maker's creditors, and votes that property which is mortgaged to secure the payment of the note shall be sold on credit, the day of payment falling after the time the note became due, the endorser is discharged; for the holder had a right to sell the mortgaged property for cash, or at least on a term to meet the payment of the debt as soon as it became due. By allowing the property to be sold on a longer time, he injured the endorser, who on paying the note would have been subrogated to the rights of the holder, and have had the right to sell the mortgaged property for cash. Lobdell v. Nipliler, 4 Miller, 294.

A respite granted to the maker of a note by an order of court in Louisiana, giving him one, two, and three years, for the payment of all his debts, does not discharge an endorser. Picquet v. Demity, 6 Lou. Rep. 120.

Where the drawer of a bill on paying it would have no right to sue the acceptor, it seems that the discharge of the acceptor does not discharge the drawer. See Sargeant v. Appleton, post, p. 361.

Where A. lent his check to B., for the accommodation of the latter, and B. passed it to C., and C. at the request of B. delayed presenting the check for some time, it was held that A. was not discharged from his liability as drawer by this delay. Murray v. Judah, 6 Cowen, 484.]

Unless the right to sue in such case result from facts out of the ordinary course; as, from the signatures being accommodation signatures.

And if the party who would be entitled to sue, assent (22) to the giving time, or if, knowing of its having been given, he (23) promise to pay the bill or note, his liability will be continued in the former case, and revived in the latter; and it will make no difference in the latter case, though the promise were made under a misconception of the law, the party believing himself to be still liable; unless the holder were instrumental in raising that belief.

[If the endorser of a note before it becomes due release to the maker all actions, causes of action, and demands, which the former has or may have against the latter, by reason or means of any act, matter, cause, or thing previously to the date of the release; if the endorser afterwards pay and take up the note, he cannot maintain an action against the maker for money paid to his use. (*v*)]

If the holder of a bill *bind* himself to give time to the acceptor, he discharges all those parties who, if they paid the bill, would have remedy over against the acceptor. (24)

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(22) Clarke v. Devlin, 3 Bos. and Pull. 363. Atkinson, the acceptor of a bill, having been arrested by the holder, offered him a warrant of attorney for the amount of the bill, payable by instalments: this offer the holder mentioned to the defendant, the drawer, proposing to accept of it; who said, "you may do as you like, for I have had no notice of the non-payment." In fact he had had notice. The Court held that this amounted to an assent on the part of the defendant to the security being taken, and therefore that the defendant was not discharged by this indulgence to the acceptor.

(23) Stevens v. Lynch, 12 East's Rep. 38. The defence in this action, which was by an endorsee against the drawer of a bill, was, that the plaintiff had given time to the acceptor; in answer to which, it was proved that the defendant knew of such time having been given, but that, conceiving himself to be still liable, three months after the bill became due, he said to the plaintiff, "I know I am liable, and if Jones (the acceptor) does not pay it, I will." Upon this Lord Ellenborough directed a verdict to be found for the plaintiff; and upon a motion for a new trial, the Court held the direction right, and refused a rule.

[(*v*) Coe v. Hutton, 1 Serg. & Raw. 398.]

(24) Philpot v. Briant, 4 Bingh. 717. In an action against the drawer of a bill, the defence was, indulgence to the acceptor's executrix. Plaintiff applied to the agent of the executrix, who said there was not

But to discharge those parties, the holder must be *bound* to give the time. (24)

And a promise without consideration will not bind him (24);

Nor will a promise void by the Statute of Frauds (24);

Or a promise, if part be paid, to give time for the residue. (24)

[The mere promise of the holder not to sue a party to a bill or note for a certain time, and to receive payment of him by instalments, if made without consideration, is *nudum pactum*, and does not discharge subsequent parties; for such a promise has no legal effect, and does not hinder the holder from proceeding at any time against the party to whom he has promised to give time. (*w*)

Where one of two makers of a joint and several note was sued, and, after judgment on it obtained against him, was committed on execution, and gave bond for the jail liberties, it was held that the holder by discharging this bond, discharged the whole debt, and consequently the other maker of the note. (*x*)

In an action against a person who signed a joint and several note as surety for the other party, it was held to be no defence that the plaintiff, having brought an action against the principal which was about to be tried at the spring assizes, took a cognovit for the debt payable by three instalments, the first on April 28, the others in May and June, but if the defendant failed in payment of any of these instalments, the plaintiff was to be at liberty immediately to enter up judgment, and issue execution for the whole sum. The ground of this decision

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sufficient property then, but if plaintiff would let the matter stand over, the executrix would engage to pay the bill out of her private income. Plaintiff promised, if the interest were paid, to give a reasonable time, and in pursuance thereof interest was paid out of the private income of the executrix: on rule nisi for nonsuit, cause shown, and time to consider, the Court held that a contract *binding* the holder to give time would discharge the drawer; but that to have that effect, the contract must be such as to *bind* the holder to give time: that a promise without adequate consideration did not bind the holder, but left him at full liberty to sue if he thought fit: that as a promise for payment out of the executrix's private income this was void, as not being in writing, and as a promise to pay out of the assets, it was only promising to do what without a promise she was bound to do.

[(*w*) Planter's Bank v. Sellman, 2 Gill & Johns. 230; M'Lemore v. Powell, 12 Wheat. 554.]

[(*x*) Hyde v. Long, 4 Verm. R. 531.]

was that if the plaintiff had proceeded in the action he could not have obtained judgment and issued execution before the 28th of April, which was the fifth day of Easter term, and therefore gave no time to the principal debtor. (*y*)

The agreement of the holder of a note overdue to receive payment of the maker in articles at a fixed price, at a future day, discharges the endorser. (*z*)

The drawer of a bill is not discharged by the holder's releasing the acceptor, where the drawer retains money of the acceptor on purpose to pay the bill. (*a*)

The endorser of a note is not discharged, in consequence of

[(*y*) Price v. Edmunds, 10 B. & C. 578.

Where the holder of a note sued the maker, and after issue joined took a *relicta* and *cognovit*, and gave the defendant a stipulation not to issue execution on the judgment to be entered on the cognovit, until a certain day, before which day, according to the course and practice of the court, he could not have brought the cause to trial, and obtained judgment, the court seemed to be of opinion that this was not such an indulgence or giving time, as would discharge the endorser. Hallet v. Holmes, 18 Johns. R. 28.]

[(*z*) Millandon v. Arnous, 15 Martin, 596.]

[(*a*) In an action against Appleton, as drawer of a bill, it appeared that he was agent and supercargo of Smith, the drawee, in his brig Levant at Marseilles, and had in his hands a balance due to Sargent, the payee, for goods consigned to Appleton, and by him sold, and the proceeds invested on account of Smith. For this balance the bill was drawn and accepted by Smith, but payment was refused, Smith having become insolvent. Smith soon after, by indenture, to which the plaintiff was a party, assigned the Levant, and her earnings, and other property to his creditors, subject to the payment of any bills which Appleton had drawn or might draw on him, for the purchase of a cargo for the Levant. The creditors, in consideration of this assignment released Smith, the acceptor, from all demands. Appleton, the defendant, had retained sufficient property of Smith's for the purpose of discharging this bill. After this assignment, the defendant in letters to the plaintiff, expressed an intention of paying the bill, and acknowledged his liability; but he was forbidden to pay it by one of Smith's creditors, a party to the indenture. The plaintiff had received nothing under the assignment. Sewall J. directed a verdict for the plaintiff. Sedgwick J. giving the opinion of the court, said, "It is true as a general rule, that where the holder of a bill discharges the acceptor, all other parties are thereby discharged. The rule would apply in this case, if on a recovery against the defendant, he could maintain an action against Smith, the acceptor. But it is impossible this could be the case; for the bill would be paid by the defendant with money which belonged to Smith, and had been retained for the express purpose. It is the opinion of the court, that the direction of the judge was right." Sargent v. Appleton, 6 Mass. R. 85.]

discharging the maker, where it is done with the consent of the endorser, (*b*) or where the holder in making the discharge, expressly reserves all his rights against the endorser, and the endorser's rights against the maker. (*c*)

[(*b*) Bruen and Sons were holders of a note made by Shelton and Beach, endorsed by Marquand. After the making of the note S. and B. assigned their property by indenture to Marquand and others, in trust for their creditors, and their creditors released all demands. One of the firm of Bruen and Sons became a party to this indenture on behalf of the partnership. Marquand was also a party as a creditor. The creditors in this instrument were divided into three classes, and those of the first class were to be first paid. In the schedule of the first class, was written, "Isaac Marquand endorsed to M. Bruen and Sons, 500 dollars." Bruen and Sons received a dividend under this assignment from Marquand and the other assignees. In an action by Bruen and Sons against Marquand as endorser, Van Ness J. delivered the opinion of the court. "The reason for holding the endorser discharged by the discharge of the maker, certainly does not apply here, viz. that the remedy by the former against the latter is materially affected or taken away; because the defendant, who is a party to the assignment, not only as a trustee, but as a creditor to a large amount, *as a creditor*, released Shelton and Beach from their liability over to him, on this note. If the intention of the parties was to preserve the liability of the endorser, it was competent for them to do so. The intent of the parties clearly appears to have been that both the holders of the note and the defendant should set the makers free, but the remedy against the endorser should remain. It was, no doubt, for this reason that the debt in question was put in the first class. The makers intended to secure (as far as they could) their endorsers, as honorary creditors. As between the holders of this note and the makers, there was no reason for giving it a preference, but as between the makers and endorser it was otherwise." Bruen v. Marquand, 17 Johns. R. 58. See Gloucester Bank v. Worcester, infra.]

[(*c*) R. and H. Stewart, holding a note made by Waring, endorsed by Eden, released Waring from all claims which they had against him on the note, "excepting always that he shall be responsible to the executors of Eden, deceased, and to them only;" and the same instrument declared that it was not to affect the claim of R. and H. Stewart against the said executors. It was held that this instrument was no bar to an action by R. and H. Stewart against the executors of Eden, the endorser. Stewart v. Eden, 2 Cain. R. 121.

Burrill held notes signed "Samuel Evans, by Asa L. Boardman, his attorney," and endorsed by Smith, given for a previous debt of Evans. Evans was dead when the notes were signed, but none of the parties knew it. Evans's estate was insolvent, and Boardman was his administrator. Burrill received a dividend on the notes from the estate, and gave a discharge in full of all demands to Boardman, as administrator. All the other creditors of Evans, including the defendant, had settled in the same manner with the administrator. In a suit brought by Burrill against Smith as endorser, it was held that the defendant was not discharged by the release given to the administrator. Parker C. J. in giving the opinion of the court said, "The discharge of the estate of Evans is only personal. It does not prevent Smith from resorting to

And where the maker of a note assigned his property for the benefit of his creditors, by an indenture, to which the holder and endorser of the note both became parties, and which contained a general release of all claims against the assignor, and a proviso that nothing therein contained should "be construed to impair or affect any lien or pledge heretofore created or obtained as security for a debt or claim due" from the assignor, it was held that the security by the endorsement came within the words of the proviso, and that the endorser was not discharged by the release of the maker. (*d*)

If the holder of a note releases the maker by a writing not under seal and without consideration, the release is void, and is no bar to a suit against the endorser. (*e*)

So the holder of a note's accepting from one of the makers,

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that for relief." Burrill v. Smith, 7 Pick. 291. This case does not give the form of release which Evans's administrator received. But if it was a simple release of all demands in common form, we do not see why it did not discharge the endorser. There is nothing in the report of the case to show that this release was of a different character from a common release. When C. J. Parker says that the discharge is only personal, meaning personal in regard to Burrill, it does not give it a different character from any other release. Burrill's demands which were released were on the notes in suit. If Smith, as C. J. Parker supposes, could still claim against Evans's estate on those notes, he would claim the same demands which Burrill had released.]

[(*d*) Gloucester Bank v. Worcester, 10 Pick. 528. This was an action against Worcester as endorser of a note made by Sargent. Before the note became due, Sargent assigned his property by indenture to trustees for the benefit of his creditors. The plaintiffs became parties to it on the day it was made, and the defendant before the note became due. The assignment contained a release of Sargent by the parties to the indenture, with the proviso, "that nothing herein contained shall be construed to impair or affect any lien or pledge heretofore created or obtained as security for a debt or claim due from said Sargent." A verdict was taken for the plaintiff, subject to the opinion of the court. Putnam J. who drew up the opinion of the court, considered the words of the release sufficient to discharge the maker of the note, but thought the word "*pledge*" in the proviso extended to the liability of the defendant as endorser; and that the defendant himself having become a party to the instrument, not only assented to the arrangement by which the bank released the maker, but also himself released all his own claims against the maker, and so could not suffer any prejudice by the bank's releasing the maker. He said the case of Bruen v. Marquand, supra, had "a most remarkable resemblance to the case at bar."

S. P. Parsons v. Gloucester Bank, 10 Pick. 533.]

[(*e*) Crawford v. Millspaugh, 13 Johns. R. 87.]

Where judgment has been obtained against the maker of a note, the holder may issue an execution on the judgment or not, as he pleases; and the endorser is not discharged in consequence of any negligence of the holder in his endeavors to obtain the money of the maker; (*n*)

If the holder of a protested bill receive of a person who has guarantied its acceptance and payment, payment of the principal and interest of the bill in discharge of his liability, and reserving his claim for damages against the drawer, it will not bar an action against the drawer for the damages. (*o*)

Neither will the endorser of a note be discharged, by the holder's receiving from the maker a written agreement, that if the holder will sue the endorser, he, the maker, will, if the money cannot be collected of the endorser, give security for the note and the costs payable in a certain time from the date of the agreement. (*p*)]

M'Cord, 13; —— v. Stanton, 1 Hayw. 271. See also Lynch v. Reynolds, post.

In an action against one of several joint promisers of a note, it was held to be no bar, that one of the others had paid his share or proportion of the money, and that in consideration thereof the payee had acquitted all the promisers. Ruggles v. Patten, 8 Mass. R. 480.]

[(*n*) In a case where judgment had been obtained against both the maker and endorser of a note, and the judgment creditor had issued a fieri facias against the maker, at the request of the endorser, and on which it appeared probable that a great part of the money might have been raised, but afterwards countermanded it, it was held that the endorser was not entitled in equity to an injunction against proceeding upon the judgment obtained against him. Livingston J. delivering the opinion of the Court, said, "If the endorser suffers any injury by the negligence of the judgment creditor, it is clearly his own fault, it being his duty to pay the money, in which case he may take under his own direction the judgment obtained against the maker. By an act of Maryland it seems expressly provided, which is, perhaps, only declaratory of the common law, that an endorser may tender to a plaintiff the amount of a judgment which has been recovered against the maker of a note, and obtain an assignment of it." Lenox v. Prout, 3 Wheat. R. 520.

Where two persons sign a note, one as principal and the other as surety, the holder's receiving partial payments of the principal, and agreeing on receiving such payments, to give him further time, but not any fixed time, does not discharge the surety. See Hunt v. Bridgham, 2 Pick. R. 581.]

[(*o*) Tombeckbe Bank v. Stratton, 7 Wend. 429.]

[(*p*) The Jefferson County Bank holding a note made by Heath and

the holder's relinquishing the attachment, where it is done in good faith, as where the holder received new security on giving up the attachment, though the security did not prove to be sufficient. (*k*)

The holder of a note is not obliged to pursue all his remedies against the maker, in order to render the endorser liable on the note. Thus where an endorsed note was given as collateral security for the payment of a sum of money directed by the court of chancery to be paid by the maker on pain of attachment, it was held that the endorser had no right to require the holder to enforce the attachment, before calling on him for payment, the holder having offered to permit the endorser to proceed against the maker on the attachment, and the maker being insolvent when the note was given. (*l*)]

Agreeing, after a bill has become due and been regularly protested for nonpayment and notice thereof given, not to press the acceptor, will (26) not discharge the drawer.

Nor will (26) receiving part of the money on account from an endorser.

[Receiving a partial payment from any party to a bill or note, will not discharge any other party. (*m*)

[(*k*) Bank of Montpelier v. Dixon, 4 Verm. R. 587.]

[(*l*) Beardsley v. Warner, 6 Wend. 610; Warner v. Beardsley, S. C. in error, 8 Wend. 194.]

(26) Walwyn v. St. Quintin, 1 Bos. and Pull. 652. In an action by endorsees against the drawer of a bill, it appeared that after the bill had become due and been protested for nonpayment, though no notice thereof had been given to the defendant, he having no effects in the hands of the acceptor, the plaintiffs received part of the money *on account*, from the endorser; and that to an application from the acceptor, stating that it was probable he should be able to pay at a future period, they returned for answer that they would not press him. It was urged that either of these facts discharged the drawer; but the court after argument and time taken to consider, held that they did not, and awarded the postea to the plaintiff. Eyre C. J. said, that, had this forbearance to sue the acceptor taken place before noting and protesting for nonpayment, so that the bill had not been demanded when due, it was clear that the drawer would have been discharged; it would have been giving a new credit to the acceptor. But that after protest for nonpayment, and notice to the drawer, or what was equivalent to notice, a right to sue the drawer had attached, and the holder was not bound to sue the acceptor: he might therefore forbear to sue him.

[(*m*) James v. Badger, 1 Johns. Cas. 131. Kennedy v. Motte, 3

ing interest in advance, of the principal, after the note is overdue, where the holder does not bind himself to wait for payment during the period for which the interest was received. (*r*)

If the surety on a note requests the holder to sue the principal, the neglect of the principal to comply with the request, does not, in Massachusetts, discharge the surety. (*s*)]

Discharging any of the endorsers will be a discharge of all (29) subsequent, though not of prior, endorsers.

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it may affect his remedy over against the acceptor; and that reason does not apply where he is not entitled to a remedy over. Verdict for plaintiff.

[(*r*) Oxford Bank v. Lewis, 8 Pick. 458. This was an action against Lewis on a joint and several note, signed by Bruce and Houghton as principals, and himself and Lawton as sureties. The note fell due in July, 1826. In February 1827, Houghton, having already made two payments on the note, paid interest for sixty days in advance. In May, 1827, Houghton absconded, carrying off all his property, Bruce having previously failed in February, 1827. Notice of the non-payment of the note was given to the defendant in June, 1827. The Court, on a case stated, held that the defendant was still liable. Parker C. J. in giving the opinion of the Court, said, "Mere delay to call on or sue the principal, will not discharge the surety, as is settled in the case of Hunt v. Bridgham. If the plaintiffs had, by any contract with the principals, disabled themselves from suing, or the surety from taking up the note in order to secure himself, a defence might be maintained. The only circumstance relied on to show this, is, that after the note became due, they received the interest for sixty days in advance, which was, by implication, giving a new credit for that time. But they retained the power of suing, and might, if they had apprehended a failure, have made an attachment. We see no ground of defence."

[(*s*) Frye v. Barker, 4 Pick. 382.]

(29) Smith v. Knox, 3 Eps. N. P. C. 46. Per Lord Eldon, "It is said that the holder may discharge any of the endorsers after taking them in execution, and yet have recourse to the others. I doubt of the law as stated so generally; I am disposed to be of opinion, that if the holder discharge a prior endorser, he would find it difficult to recover against a subsequent one."

So also in English v. Darley, 2 Bos. and Pull. 62, Lord Eldon, after adverting to the inaccuracy of the marginal abstract of the case of Hayling v. Mulhall, said, had the plaintiff first sued a prior endorser and discharged him from execution, it would have afforded a sufficient objection to an action against a subsequent endorser. See Hayling v. Mulhall, antè, p. 353, n. (16).

[Releasing an endorser discharges a subsequent endorser. And assumpsit for money had and received lies by the endorser of a note against the holder, to recover back money paid on a judgment against such endorser, where the holder previously to the payment, by a sealed instrument, releases a prior endorser or enters into a covenant not to sue him. Brown v. Williams, 4 Wend. 360.]

[Discharging the guarantor of a bill will not, it seems, discharge the drawer. (*t*)]

An agreement between holder, drawer, and acceptor, that the acceptor shall pay, discharges the drawer, if the acceptor be to pay to a limited extent only;

As, the bill without expenses. (30)

Taking a fresh bill from the acceptor, as a collateral security, will not discharge the drawer (31), unless there be a bargain to give time. (31)

[So the holder of a note over due accepting from the maker the note of a third person payable at a future day, as collateral security, with an express stipulation that his receiving the new note, should not prejudice his claim against the maker and endorser of the first note, or prevent a suit being com-

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[(*t*) Tombeckbee Bank v. Stratton, 7 Wend. 429.]

(30) De la Torre v. Barclay, 1 Stark. 7. The drawers of a bill having become bankrupts, an agreement was entered into between their assignees, the holder (plaintiff), and the acceptor, by which the acceptor agreed to pay the amount of the bill, provided he were not called upon to pay more; the agreement recited the bill, the acceptance, and the probability of its being sent back for non-payment. Plaintiff having afterwards sued the drawers, Lord Ellenborough held this new agreement, which varied the condition of the acceptor, was a waiver of the right of action against defendants, who were represented by their assignees; nonsuit.

(31) Pring v. Clarkson, 6 Barn. & Cres. 14. A bill for 85*l.* 8*s.* 7*d.* was dishonored, and notice given to defendant, the drawer: Geddin and Co. the payees, took it up, and Thompson, the acceptor, afterwards sent them a second bill for 126*l.* but nothing was said or stipulated as to the first bill: Geddin and Co. discounted the second bill, and passed the first to plaintiff on a valuable consideration. It was urged, that by taking the second bill Geddin and Co. virtually gave time to the acceptor upon the first, and discharged the drawer; but, Abbott C. J. and afterwards the Court, held otherwise; for, as the second bill was taken as a collateral security only, it left all the rights upon the first entire.

It does not appear to have been urged, that as plaintiff took the bill after it was due, he could have had no better right than Geddin and Co., and that after using the second bill, they had no right, till the second was dishonored, upon the first.

[Taking from the maker of an endorsed note after it becomes due, a new note on time, as security for the first note, does not discharge the endorser, unless there be an agreement not to sue the maker on the first note. Ripley v. Greenleaf, 2 Verm. R. 129.]

menced, if ordered by the endorser, is not such a giving of time to the maker, as discharges the endorser. (*u*)]

Taking the separate notes of one of several partners, at distant dates, as a collateral security, will not discharge the others, if the party insist at the time that it shall not prejudice his claim upon the partnership, and he do not bind himself to wait till the notes are due. (32)

Though the partnership were dissolved before such notes were given (32) :

Otherwise, if he bind himself to wait. (32)

[Where the holder of a bill drawn by A. and accepted by B., but protested for non-payment, drew a bill upon A. and B. jointly for the amount of the first bill and damages, which was accepted by B., but not by A. ; it was held that A., the drawer of the first bill, was not thereby discharged. (*v*)]

[(*u*) Bailey v. Baldwin, 7 Wend. 289.]

(32) Bedford v. Deakin, Bickley and Hickman, 2 Stark. 178. Defendants were drawers of a bill, which was dishonored ; they dissolved partnership, and Hickman became bankrupt ; Bickley afterwards proposed to give his own notes at four, eight, and twelve months as a security, and one Rushbury added his name as surety : plaintiff, who held the bill, agreed to take the notes, reserving to himself the security he held from the three, and he retained the bill. Interest was calculated on the notes till they would become due. In an action afterwards upon the bill against the three, it was urged, that the taking these notes discharged Deakin and Hickman : Lord Ellenborough said, he should have acceded to the objection had plaintiff agreed to postpone his remedy upon the bill, but as he had not, and on the contrary had retained the bill, and expressly reserved to himself that security, he thought the taking the notes did not alter the original liability of the three defendants, and plaintiff had a verdict.

[(*v*) Furse at New-York drew a bill on Angove, in England, which came by endorsement to Suckley. The bill was accepted, but was protested for non-payment, and returned to Suckley. He then drew another bill on Furse and Angove jointly, at sixty days' sight, for the amount of the first bill, and 20 per cent. damages. Suckley sent this bill to his partner, Holey, in England. This bill was accepted by Angove, but not by Furse, and was returned to Suckley unpaid. Suckley then sued Furse upon the first bill. Yates J. delivered the opinion of the Court. "Holey's act in taking the acceptance of Angove alone, did not bind the plaintiff, and consequently could not discharge the liability of Furse as drawer of the original bill, on the ground of an agreement for an extension of the time of payment, or the giving of a new credit. No such agreement had ever existed between the parties. The new bill being for an existing debt, could not affect the original liability of Furse ; for it is a settled rule of law, that a bill shall not be a discharge of a precedent debt, unless it be so expressly agreed between the parties." Suckley v. Furse, 15 Johns. R. 338.]

Receiving dividends under a commission of bankruptcy is a satisfaction pro tanto only.

[But where a person took up a note for the honor of an endorser, and afterwards assented to the discharge of the maker as an insolvent, signed his petition, and made affidavit of his debt as being money paid to the use of the maker; it was held that the endorser was discharged. (*w*).

Where an endorser of a note had been charged by due presentment and notice, it was held that his liability being thus fixed, was not discharged by his agreeing in writing on the back of the note, to be holden as endorser for a specified time, in consideration of the holder's forbearing to sue the maker. (*x*)]

After a partial satisfaction, the holder must (33) not in an

[(*w*) D. Lynch, Jr., as agent of J. Lynch, sold goods to Reynolds, for which he took his note, endorsed it, and had it discounted. Reynolds failing, D. Lynch, Sen. took up the note for the honor of the endorser, and afterwards assented to the discharge of the maker, signed his petition, and made affidavit of his debt, as being money paid to the use of the maker in taking up the note. After the discharge, J. Lynch paid D. Lynch, Sen. the amount of the note, and then sued Reynolds for money paid to his use. Per Curiam. "If the holder of a bill or note, compounds with the acceptor or maker, without the assent of the other parties to it, he thereby discharges them from their liability. Taking a sum of money in part payment and accepting a dividend, would not produce the same effect; for these acts are advantageous to the other parties. But if the holder does an act which takes away and destroys the remedy of the other parties against the maker, upon the very note, he forfeits his right to call upon the endorsers. Here the holder took upon himself, in effect, to discharge the maker of the note from his liability to pay the debt; and we have a right to intend, that the defendant could not have obtained a discharge under the insolvent act, unless D. Lynch, Sen. had united in his petition. D. Lynch, Sen. must have considered himself as having no further claim upon the other party, for he swears that the money was paid for the use of the defendant. We are of opinion that the payment made by the plaintiff to D. Lynch, Sen. was made in the plaintiff's own wrong, it could not have been enforced at law: and therefore cannot be the basis of a suit against the defendant." Lynch v. Reynolds, 16 Johns. R. 41.]

[(*x*) Smith v. Hawkins, 6 Conn. R. 444.]

(33) Bacon v. Searles, 1 H. Bl. 88. Upon a bill for 95*l.* 10*s.* the drawer paid the plaintiff 60*l.* 10*s.*, and on an action against the acceptor, *he*, the acceptor, paid the residue with the interest into Court; the plaintiff however proceeded, and after a verdict for the defendant, with liberty to the plaintiff to move to enter a verdict for him, he contended that the acceptance having made the defendant liable for the whole, and a personal contract not being divisible, he was entitled to recover, and to

action take a verdict for more than the sum remaining due: if he do, the Court will (34) either make him correct the verdict, and pay any expense the mistake may have occasioned, or grant a new trial.

[After a judgment recovered by the holder of a note against the maker for a sum less than what was actually due on the note, has been satisfied, the holder cannot maintain an action against an endorser, to recover the difference between the amount of his judgment and the sum actually due on the note. (*y*)]

Satisfaction of a bill or note, as to one of several partners,

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stand as a trustee for the drawer, but the Court held otherwise, and the verdict stood.

Pierson v. Dunlop, Cowp. 571. In an action against the acceptor upon a bill for 300*l.* the plaintiff took a verdict for the whole sum; the defendant filed a bill against him in the Exchequer, and he admitted in his answer that he had previously received 180*l.* from the drawer; this (among others) was urged as a ground for a new trial, and after cause shown, Lord Mansfield said, "The verdict is certainly taken for 180*l.* more than was due; there was no admission of this payment at the trial, which was very wrong, and has been the occasion of filing a bill in the Exchequer; therefore, there ought to be a deduction of the money received, and a proportionable part of the interest, together with all the costs in the Exchequer;" and though the Court discharged the rule for a new trial, they made the plaintiff remit the 180*l.* with interest upon it from the time it was paid, and pay the costs of the bill and answer in the Exchequer.

However, in Johnson v. Kennison, 2 Wils. 262, the defendant drew a bill for 1000*l.* in favor of Benson or order, and Benson endorsed it to the plaintiff; Benson paid the plaintiff 232*l.*, notwithstanding which, the plaintiff took a verdict for the whole 1000*l.*; and upon a rule nisi for a new trial upon this ground, the Court are represented to have held that he did right; but, in Bacon v. Searles, supra, Wilson J. considered the report inaccurate, and the authority questionable.

(34) See Pierson v. Dunlop, supra.

[(*y*) Couch v. Waring, 9 Conn. 261. In this case the holder of a note brought an action against the maker, and recovered judgment for the full amount of damages which he claimed, but which, in consequence of the action's having been in Court for a number of years, did not amount to so much as the principal and interest due on the note. This judgment was satisfied. The holder then commenced this action against an endorser to recover the difference between the damages recovered against the maker, and the principal and interest of the note. It was held that the action could not be maintained. Bissell J. considered the plaintiff's acts as having extinguished all further claim on his part against the maker, and therefore that the plaintiff could have no claim against the endorser, since his recovering of the endorser would give the endorser a claim against the maker.

is a satisfaction as to all; and if a person be a partner in two firms, satisfaction as to one firm is (35) so as to both: what would bar one firm will bar the other.

And it will make no difference though one common partner be in fact ignorant of the circumstances which constitute the satisfaction.

Thus, if one house receive funds from the drawer to take up a bill, and misapply them, no other house to which any member of the first house belongs can sue the drawer;

Nor, if he stand in the place of the drawer, the acceptor. (35)

[A bill of exchange was endorsed by one person and accepted by another for the accommodation of the drawer, who had agreed to take it up at maturity. But the drawer failing before the bill became due, it was paid by the endorser. The drawer, when he failed, assigned his property for the benefit of his creditors, providing *inter alia* for securing and indemnifying the endorser, who became a party to the instrument, and thereby released the drawer. The assignees had sufficient funds to pay the bill, to which the drawer might resort. It was held that the endorser could not maintain an action against the acceptor, but must resort to the funds in the hands of the assignees. (*z*)

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(35) Jacaud and Gordon v. French and others, 12 East's Rep. 317. Jacaud was in partnership with Blair in Ireland, and with Gordon here. Jacaud and Gordon had a bill drawn by Farrell and Co. on defendants, and Farrell and Co. had supplied Jacaud and Blair with funds to pay this bill: Blair misapplied those funds, and on an action on the bill by Jacaud and Gordon, the defence was, that the misapplication by Blair was a misapplication by Jacaud also, and that after being guilty in one house of disappointing payment by misapplying the payment-fund, he could not endeavor to enforce payment in another: and upon a case reserved the Court was of that opinion, and the postea was awarded to the defendants.

[(*z*) This was an action brought by Wm. B. Bradford against Hubbard & Co. as acceptors of a bill. John R. Bradford, of Boston, drew the bill, which was for $1000, on Hubbard & Co. of Richmond, payable in four months at the Mechanics' Bank in New York. The bill was endorsed by Wm. B. Bradford, for the accommodation of the drawer, and was also accepted by Hubbard & Co. for his accommodation, he undertaking to provide funds to take it up at maturity. All these facts were known to Wm. B. Bradford, who recommended this mode of raising money. Before the bill became payable, the drawer stopped

The acceptor's being indebted to the drawer, will not make him liable to the action under these circumstances, the bill being in fact drawn and accepted for the drawer's accommodation, without any reference to the debt. (*z*)

Nor will an attempt made by the acceptor to secure himself against his liability as acceptor, by a suit in the nature of a foreign attachment, and his actually obtaining a partial security by such process render him liable to the action, the amount recovered by him in the process being still under the control of the court of equity in which it was recovered. (*z*)

If the holder of a note on which there are several endorsers in blank, sue the maker, and write over the name of the first endorser an order to pay it to himself (the holder), without

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payment and assigned his property for the benefit of his creditors, providing among other things for securing and indemnifying Wm. B. Bradford against any liabilities by endorsement of any notes, bills, &c. on account of John R. Bradford. Wm. B. Bradford paid the bill, and the assignees had in their hands property sufficient to take up the bill which they were ready to pay him in case he failed to recover of the acceptors in this suit, all which he knew. Hubbard & Co. owed John R. Bradford $300, not due when the bill was drawn, and the bill was drawn without any reference to this debt. After John R. Bradford's failure, Hubbard & Co. commenced a suit in Virginia against him in the nature of a foreign attachment, and recovered of one of his debtors $270 by decree of the Court, the ground of the suit being their liability as acceptors of the bill. Hubbard & Co. by order of the Court gave a bond to respond for the amount whenever the Court should order, and they were ready to pay it over to any one authorized to receive it on being discharged from their bond. They were also ready to pay the $300 due to John R. Bradford. It was held that the action could not be maintained. Parker C. J. in giving the opinion of the Court, said, "If the holder has in his hands funds of the drawer who is the real debtor, with a right to apply them to the discharge of the bill, he can have no right to call on the acceptor. Indeed the bill ought to be considered then as paid. Now we consider the appropriation of the proceeds of the effects of John R. Bradford to the payment of the plaintiff as endorser, in the same light as if the money was in his own hands. It is so appropriated by the assignment, and the money is at the command of the plaintiff whenever he chooses to receive it. There is no reason in compelling the defendants to pay him, in order to release that portion of the funds for other creditors, and oblige the defendants to come in among the unpreferred creditors to obtain probably a small part, and perhaps nothing of their debt."

"The proceedings of the defendants in Virginia, whereby they attempted to secure themselves out of debts due there to John R. Bradford, by a process in Chancery, does not affect their liability in this action." Bradford v. Hubbard, 8 Pick. 155.]

striking out the names of the other endorsers, he does not thereby discharge them. And therefore one of them, who pays him the amount of the note, may sue any of the prior parties. (*a*)]

In an action upon a bill or note, the plaintiff is, in general, entitled to recover the money payable thereby, with (36) interest, and (37) all incidental expenses occasioned by non-acceptance or non-payment.

The interest is, in general, to be computed from the time the bill or note would regularly have been payable, and it is, in general, to be carried down to the time when final judgment may be signed. (38)

Thus, upon a bill or note payable on presentment or demand, interest (39) must be computed from the presentment or demand.

But, if a bill or note payable at a given time after date, be

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[(*a*) Coles v. Cushing, 8 Pick. 48.]

(36) D. Mar. 2d ed. 13. Blaney v. Bradley, Blackst. 761. By the Court, "interest is due on all bills of exchange and notes of hand payable at a day certain, or after demand, if payable on demand." See also Bunb. 129. 2 Term Rep. 58.

(37) Vide Mar. 2d ed. 13. In Symonds v. Parminter, antè, p. 339. note (I), the plaintiff recovered interest, exchange and re-exchange; and in Auriol v. Thomas, (post, p. 380. n. 51.) 10*s.* per pagoda in lieu of interest, exchange, and all other charges.

(38) Robinson v. Blande, Burr. 1077. In an action upon a bill of exchange, and for money lent, a case was reserved, and the Court was of opinion that the plaintiff could not recover upon the bill, but that he might for the money lent; but they took time to consider, with a view to settle the future practice, to what time interest, when payable, should be computed, and afterwards determined that it should be computed to the time of final judgment.

(39) Blaney v. Bradley, supra, note (36). Cotton v. Horsemanden, Pract. Reg. 357. The Court held, that in actions upon promissory notes payable on demand, interest should be given from the time of the demand proved; but, in this case, where it appeared upon the face of the note to be for money lent, interest should be given from the date of the note. 9 Mod. 138. by the Court, "interest upon a bill of exchange commences from demand made."

[In Rensselaer Glass Factory v. Reed, Spencer, Senator, in his opinion, says that in case of a note payable on demand, interest "is never allowed but from the time of demand made by suit or otherwise." 5 Cowen, 611.

S. P. Cannon v. Beggs, 1 M'Cord, 370.

So a single bill payable on demand, was held to carry interest only from the time of demand. Breyfogle v. Beckley, 16 S. & R. 264.]

for a specified sum "bearing interest," interest shall be computed from the date. (40)

If a bill be, by the acceptance, made payable at a particular place, the acceptor will not be liable for interest without proof of presentment at that place (41), unless there be evidence that the acceptor must have known that a presentment there would have been unavailing.

It has, indeed, been holden (42), that if a party, entitled to notice of the dishonor of a bill or note, offer to pay it within a reasonable time after the notice is given, he is not liable for in-

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(40) Kennerly v. Nash, 1 Stark. 452. Action on bill at four months after date for 25*l.* 4*s.* bearing interest; and per Lord Ellenborough, "these words entitle plaintiff to interest from the date of the bill; without them, he would have been entitled to it from the time it became due."

Hopper v. Richmond, 1 Stark. 507. By the terms of a note defendant undertook to pay legal interest on demand: Lord Ellenborough held, that must mean from the date of the note.

Denman v. Dibden, 1 Ryan & M. 380. In an action upon the following bill, "Eight months after date pay to me or my order the sum of 100*l.*, for value received, with lawful interest for the same," Abbott C. J. was referred to, to say from what time the interest was to be computed, and he answered, "from the date of the bill."

(41) Phillips v. Franklin, Gow, 196. In an action against the acceptor upon two bills where the acceptance pointed out a particular place for payment, there was no proof of presentment at that place: and per Holroyd J., "I think you cannot support your claim for interest: though it be unnecessary to prove the presentment in order to recover the principal, the right to interest depends upon a different consideration."

(42) Walker v. Barnes, 5 Taunt. 240. A bill for 10*l.*, due 11th June, was presented for payment on that day, and dishonored. On the 12th, notice was sent by letter to the drawer, and early on the 13th, he tendered the 10*l.*; the 10*l.* was not accepted, and on an action against the drawer, it was urged for the plaintiff, that the tender was insufficient, for that defendant ought to have tendered the interest from the 11th to the 13th; but on the point being reserved, the Court held it sufficient, if the drawer, within a reasonable time after the notice, tendered the principal without the interest, and judgment was given for the defendant.

Note, the interest would have been under three farthings,—one fifteenth part of ten pence. But quære, whether non-payment by the drawee was not a breach of the drawer's contract, and whether the holder was not entitled to interest, for not receiving on the 11th what defendant undertook he should receive on that day. It may be observed, however, in support of this decision, that the constant form in assumpsit against a drawer or endorser, makes him promise only for the amount of the money mentioned in the bill. It is silent as to interest. It is, however, silent also as to expenses.

terest from the time of the dishonor: but, perhaps, there might be risk in acting upon that decision.

[If a note be made payable at a certain time after date, with interest from the date, if not paid within a certain time after a legal demand, interest is recoverable from the date, where the maker fails to pay within the time after a demand. (*b*)

In an action upon three notes payable with 3 per cent. interest per annum if paid at maturity, "if not, 6 per cent. interest to be paid;" and upon a fourth payable without interest "until the note is out, if not paid then, lawful interest until paid,—" the notes not having been paid when they fell due, judgment was given for their amount, with 6 per cent. the lawful interest, from the date to the time of the judgment. (*c*)]

Where all that is due is tendered, and the holder has mislaid the bill or note, so that he cannot give it up, and payment is, on that account, postponed, the interest shall be computed up to the time of such tender only. (43)

The language of 3 & 4 Ann. seems to imply, that a neglect to procure a protest upon any inland bill for the payment of 20*l.* upon which a protest might have been made (44), would preclude the holder from recovering such interest or expenses from any person entitled to notice of the non-acceptance or non-payment; but the contrary is now settled. (45)

Whether it would preclude the holder of a coal-note given under 3 Geo. 2. c. 26. s. 7. is not decided.

A jury is not bound to give interest upon a bill or note; and where the bill or note has lain dormant for many years without any claim being made upon it, they may properly refuse it. (45*)

And for any time that it has been in the hands of an alien enemy interest ought not to be allowed; because during that time, payment of the principal would have been illegal. (45*)

[(*b*) Horner v. Hunt, 1 Ind. R. 213.]
[(*c*) Dugget v. Pratt, 14 Mass. R. 177.]
(43) See Dent v. Dunn, antè, 355, n. (18).
(44) See 3 & 4 Anne, c. 9. s. 5. antè, p. 259, n. (91).
(45) See Windle v. Andrews, antè, p. 258, n. (90).
(45*) Du Belloix v. Lord Waterpark, 1 Dowl. & R. 16. Payee against maker, on note for 800*l.* of 27th December, 1787, payable six months

[On a note made in one place, payable in another, interest is recoverable according to the legal rate of the place where it is payable. (*d*)

So if a bill be drawn in one country, and payable and accepted there, in an action against the acceptor, interest is recoverable only according to the legal rate of that country, although the suit is brought in another country. (*e*)

Where a note is discounted at less than the legal rate of interest, interest at the legal rate is recoverable against an endorser in an action on the note by the party that discounted it. (*f*)

Where the endorsee of a note purchases it from the endorser, the former can recover of the latter only the consideration actually paid, though less than the amount of the note. But the maker is liable for the full amount. (*g*)

An endorsement is however *primâ facie* evidence of a full consideration. (*h*)

The drawer or endorser of a protested bill is, where the law makes no special provision, only liable for interest from the time when the identical one of the set which was protested is produced to him. (*i*)]

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after date. The cause was tried in 1821; there was no evidence of any claim upon the note from the time it was made, and for many years of the intermediate time plaintiff had been an alien enemy: the jury asked if they were bound to give interest, and Abbott C. J. told them *that* was for their consideration; and they gave none. A motion was made to increase the verdict by adding the interest, or for a new trial; but the Court was clear that the question of interest was within the province of the jury; that it was in the nature of damages for the non-payment of the debt; that they were to say whether there should be any and what damages on that account, and that in this instance there was no ground for saying they had not exercised their discretion rightly. Abbott C. J. added, that during the time the plaintiff was an alien enemy, it would have been illegal to have paid him the debt, and that for that interval therefore damages could not legally have been given; the rule was refused.

[(*d*) Scofield v. Day, 20 Johns. R. 102.]

[(*e*) Foden v. Sharp, anté, p. 83.]

[(*f*) Mechanics' Bank v. Minturn, 19 Johns. R. 244.]

[(*g*) Braman v. Hess, 13 Johns. R. 52; Munn v. Commission Company, 15 Johns. R. 44. See also Brown v. Mott, 7 Johns. R. 361; and Wiffen v. Roberts, 1 Esp. R. 261.]

[(*h*) Riddle v. Mandeville, 5 Cranch, 322. It is otherwise if it be made without recourse. Welch v. Lindo, 7 Cranch, 159.]

[(*i*) In an opinion of Chancellor Kent, on a case submitted to him

The only incidental expense in the case of the person who made the presentment is the charge of the noting and protest; in the case of any antecedent party, that of the return of the bill or note must be added.

Upon a foreign bill the (46) re-exchange forms a part of the expense of the return, and let the bill be returned through ever so many hands, the (46) drawer is liable for the re-exchange upon each return.

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since his retiring from office, as to the necessity of producing the very bill of the set which was protested and the original protest, in giving notice to the drawer or endorser of a bill, he says, "This question about the production of the identical number of the set that was accepted and protested, affects nothing but the point of *interest*. If the holder calls on the drawer or endorser for payment, and shows him a copy of the protest and one of the set of bills, but not the one that was accepted and protested, and the drawer offers to pay the bill and protest and damages, and re-exchange, *provided the bill itself be produced*, and not otherwise, and it is not produced, is he bound to pay *interest* from that time? I am of opinion that he is not bound to pay interest, *until the bill be produced*, or its loss accounted for, for he is not in *default of payment* until then. The drawer is *entitled* to the accepted bill if he is obliged to pay it, and if he offers to pay, but insists on the bill previously, and the other party for his own convenience chooses to retain it, or leaves it abroad, I conclude that interest will not begin to run *until a redemand accompanied by the bill*." Though the preceding remarks refer only to the case of a bill accepted and protested for non-payment, yet the author inclines to the same opinion with regard to a bill protested for non-acceptance. He cites Beawes, Lex Merc. 424. s. 74. "No drawer or endorser is obliged to make restitution on sight of the protest alone, nor on sight of the protest and the unaccepted bill, when one of them hath been accepted; but he is obliged to give a satisfactory security to the remitter on his producing only the protest, and to make payment when this and the accepted bill are presented together." He also cites Code de Commerce, art. 148, 151. See also Dent v. Dunn, antè, p. 355.]

(46) Mellish v. Simeon, 2 H. Blackst. 378. A bill was drawn in London upon Paris, and negotiated through Holland; before it became due the French government prohibited the payment of any bill drawn in England, in consequence of which it was dishonored, and sent back, through the different hands by which it had before been negotiated, to London; the re-exchange between Paris and Holland, raised the bill from 603*l.* 19*s.* 10*d.* to 905*l.* 13*s.* 9*d.*, and the re-exchange between Holland and London to 913*l.* 4*s.* 3*d.*, which the plaintiff (the payee) paid; and upon an action by him against the drawer, Eyre C. J. left it to the jury, whether the defendant was liable for the re-exchange occasioned by returning the bill through Holland, and they found that he was. An application was made for a new trial upon the ground that the defendant was not liable for the re-exchange, because there was no default in him, the payment being prohibited by the government of France; but the Court held it immaterial why the bill was not paid, that as it was

And the (47) drawer is liable for the re-exchange and every other expense arising from the non-acceptance or non-payment, notwithstanding the dishonor of the bill was expressly ordered by the country on which it was drawn.

It has been said (48) that the acceptor is not liable for re-exchange, and that his contract cannot be carried further than to pay the sum specified in the bill, together with legal interest where interest is due; but if by his breach of contract the expense of re-exchange be actually incurred, ought he not to pay it? (49)

[The drawer of a bill, or the endorser of a bill or note who has been sued by the holder, and obliged to pay the costs of the suit, cannot, in an action against the acceptor or maker, compel him to pay those costs, in addition to the amount of the bill or note. (*k*)

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not paid, he was liable to all the consequences, of which the re-exchange was one, and the rule was refused.

(47) See the preceding note (46.) Vide Detastet v. Baring, 11 East's Rep. 265.

(48) In Napier v. Schneider, 12 East, 420, post. [See also Dawson v. Morgan, infra.]

(49) Pothier says he ought to pay it: and in Francis v. Rucker, Ambl. 672. the drawer was in effect allowed to prove it under a commission against the acceptor. See Co. B. L. 176. 2 Bro. Chan. Ca. 599.

[(*k*) Simpson v. Griffin, 9 Johns. R. 131. The court says, "If the endorser of a note be duly fixed, he ought to pay it, without waiting to be sued. It is his own fault or misfortune that subjects him to costs. He can only look to the maker for the amount of the note." Simpson v. Griffin, 9 Johns. R. 131. S. P. Steele v. Sawyer, 2 M'Cord, 459. See also Stone v. Taylor, 1 Nev. & Man. 250. But see Jones v. Brooke, post, ch. xiii. note (8), and Smith v. Woodcock, ante, p. 350, note (10.)

Dawson v. Morgan, 9 B. & C. 618. Defendant was the acceptor of a bill payable to the order of the drawer, and endorsed by him to plaintiff, and by plaintiff endorsed to Florance; the bill being dishonored, Florance sued plaintiff, and recovered the amount of the bill, and 20*l.* 0*s.* 6*d.* for costs: but Florance having also recovered judgment against defendant, and having obtained the amount of the bill from him, all but the 20*l.* 0*s.* 6*d.* was returned to plaintiff; the plaintiff thereupon sued defendant for the 20*l.* 0*s.* 6*d.*, and alleged that defendant was liable to pay it by the usage and custom of merchants. Lord Tenterden thought plaintiff not entitled, and nonsuited, and on motion for new trial, observed, that there was no privity between plaintiff and defendant; that there was no obligation on defendant, but what the custom of merchants raised; that that did not give an endorser right to recover re-exchange from the acceptor, much less costs. Rule refused.

In the case of Jones v. Phillips, 1 Pet. C. C. R. 350, a question was made whether the endorser of a bill who had been sued and compelled

The acceptor of a bill is in no case obliged to pay damages. (*l*)

Nor is the maker of a note liable to pay the costs to which an endorser has been subjected in consequence of a *ne exeat* issued against him by the holder before the note fell due. (*m*)

But where principals directed their agent to draw on them for the amount of purchases made by him on their account, and the agent in consequence drew upon his principals, who refused to accept the bills, and the drawer was in consequence obliged to pay the amount of the bills and damages to the holders, it was held, that the drawer might recover of the drawees the amount of the bills and damages thus paid, on a count for money paid to their use, and that the bills might be given in evidence on that count. (*n*)

Where the endorsee of a note sued the maker, and failed to recover on account of the illegality in the consideration between the maker and payee, it was held that in an action by the endorsee against the payee who had endorsed the note to him, he could only recover the principal and interest of the note, and not the costs or expenses of the suit against the maker. (*o*)]

If, by the terms of a note, the holder have the option of being paid either at the place where it was made, or, "according to the course of exchange" between that place and another, he (50) may insist upon being paid according to such course

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to pay the amount of the bill with costs, could recover the costs of that suit in an action against the acceptor. But the declaration being only on the acceptance and containing no money count, Washington J. said the question could not arise on the declaration.

It seems to be admitted in one case, that the drawer of a bill accepted for his accommodation, would be liable to the acceptor to pay the costs which the acceptor had been compelled to pay in a suit against him. Bagnall v. Andrews, 4 M. & P. 839.]

[(*l*) Bain v. Ackworth, 1 S. Car. R. 107.]

[(*m*) Richardson v. Presnall, 1 M'Cord, 192. In this case the maker paid the note at maturity. But there is no reason to suppose that this circumstance varied the decision of the case.]

[(*n*) Riggs v. Lindsay, 7 Cranch, 500. See also Kingston v. Wilson, 4 Wash. C. C. R. 125.]

[(*o*) Copp v. M'Dugall, 9 Mass. R. 1.]

(50) Pollard v. Herries, 3 Bos. and Pull. 335. The defendant gave the plaintiff a note for payment, at seven days' sight, of 1200 livres Tournois and interest, drawn at Paris, and expressed to be "payable as above in Paris, or, at the choice of the bearer, at the Union Bank in

of exchange as exists between them at the time when the note becomes due.

And it makes no difference, that at the time when the note was made there was a direct course, and at the time when it becomes due there is is no direct, but only a circuitous course of exchange between them.

On the return of a bill drawn here for the payment of pagodas in the East Indies, the (51) practice is to allow for the

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Dover, or at my usual residence in London, according to the course of exchange upon Paris." In an action on this note the defendant paid 18*l.* 16*s.* 6*d.* into court. The jury found a verdict for the plaintiff with 40*l.* 6*s.* 10*d.* damages, subject to the opinion of the court upon a case stating the making of the note, and the due presentment in London, and that, at the time when the note was made, there was a direct course of exchange between London and Paris, that that exchange had fallen, and before the note became due had altogether ceased; that, according to the last direct course, 18*l.* 16*s.* 6*d.* would be sufficient to pay the note; that when the note became due there was no direct course, but that a circuitous course of exchange through Hamburgh existed, and that, according to that circuitous course, the sum of 59*l.* 3*s.* 4*d.* would be due upon the note. The court held, that the plaintiff had a right to insist upon being paid according to such circuitous course, and the verdict therefore was entered for 40*l.* 6*s.* 10*d.*

[But in an action brought in New York on a note made in Canada, payable to the plaintiffs, residents in England, "with interest until paid in England," it was held that "the plaintiffs were not entitled to any allowance on account of the difference of exchange with England:" but that they were entitled to English interest up to the time of the judgment, not to the time when the money might in the ordinary course of business be remitted to England. Scofield v. Day, 20 Johns. R. 102.

In Massachusetts also it is held that a foreign merchant suing there cannot recover any thing more than his debt at the par of exchange, although the debt would in the usual course of business have been paid in the foreign country. Adams v. Cordis, 8 Pick. 260.

In South Carolina it is provided by statute that in any action on any bill or for any debt payable in any other country, the jury may give a verdict for such difference of exchange as shall be just. St. S. Car. 1796. 2 Brev. Dig. 48. See also note (*p*), p. 386, post.

Where exchange is recoverable against a party to a bill, Washington J. held that it is to be settled at the rate prevailing at the time of the verdict. Cropper v. Wilson, 3 Wash. C. C. R. 125.

"Si une lettre de change est indiquée payable en piastres, l'accepteur peut la payer en monnaie de France representant, au cours de la place, la quantité de piastres indiquée. Mais alors quel cours suivra-t-on? sera-ce celui du jour du paiement? Il'parait resulter d'un arrêt du conseil d'etat, du 19 Février, 1760, rapporté par Jousse, dans son Recueil t. 3 p. 308, que l'on doit suivre le cours du jour de l'echeance, a moins de stipulation contraire." Note de Pailliet au Cod. de Com. L. 1. Tit. 8. art. 143.]

(51) Auriol v. Thomas, 2 Term Rep. 52. Upon executing a writ of

sum payable by the bill, interest, and all incidental charges, after the rate of 10*s.* for each pagoda, and five per cent. thereon from the expiration of thirty days after notice of the bill's dishonor; and it has been (51) determined that this practice was lawful, even where the price allowed for each pagoda on the discount of the bill was only 6*s.* 6*d.*

[In most of the United States damages, in addition to the principal sum and interest, are recoverable on bills, returned dishonored, whether payable within or out of the United States. The amount of these damages varies very much in different States. (*p*)

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inquiry on a bill for the payment of 800 star pagodas returned protested from India, it appeared that the usage was to charge 10*s.* per pagoda for bills returned from India protested, and five per cent. after the expiration of thirty days from the notice to the defendant of the bill's dishonor, which included all incidental charges, and that the defendant had agreed to pay accordingly; upon which the jury assessed the damages at 10*s.* per pagoda, with the five per cent., though the plaintiff discounted the bill at the rate of 6*s.* 6*d.* a pagoda; that being then the current price. A rule nisi was obtained to set aside the inquisition on the ground that this allowance was exorbitant, and the agreement for it usurious; but the Court, on cause shown, thought otherwise, and discharged the rule.

[(*p*) The old rule as to damages on bills drawn in Massachusetts upon places out of the United States, appears from the opinion of the Court, delivered by Parsons C. J. in Grimshaw v. Bender. "Here the usage is to allow the holder of the bill the money for which it was drawn at par, and also the charges of protest, with *American* interest on those sums from the time when the bill should have been paid; and the further sum of one tenth of the money for which the bill was drawn, with interest upon it from the time payment of the dishonored bill was demanded of the drawer. But nothing has been allowed for re-exchange, whether it is below or at par. This usage is so ancient that we cannot trace its origin; and it forms a part of the law merchant of the commonwealth." 6 Mass. R. 187. In Barclay v. Minchin, 6 Mass. R. 162, damages were assessed by the same rule.

By a statute of Massachusetts passed in 1826, it is enacted, that where any bill is drawn or endorsed in the State after the first of April, payable at any place beyond the Cape of Good Hope, in Africa, Asia, or the islands thereof, shall be refused acceptance or payment, the drawer or endorser shall, on due notice and demand thereof, pay the contents of such bill, at the par value thereof, together with twenty per cent. thereon, in full of all damages, interest, and charges; and where any bill so drawn or endorsed and payable at any other place out of the United States, is dishonored, the drawer or endorser, shall on due notice and demand thereof, pay the contents of such bill at the current rate of exchange at the time of demanding payment, and five per cent. damages on the contents of such bill, together with interest on such contents from the time when such bill shall have been refused acceptance

The person to whom a bill is remitted in payment of an an-

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or payment, which shall be in full of all damages, charges, and expenses. Mass. St. March 4th, 1826.

When any bill drawn or endorsed in Massachusetts payable at any place without the State and within the United States, is protested for non-acceptance or non-payment, the drawer or endorser, besides the contents of the bill, the costs, and interest, is liable to pay damages to the holder at the following rates, viz. three per cent. if payable in any of the New England States or New York; five per cent. if payable in New Jersey, Pennsylvania, Delaware, Maryland, Virginia, or District of Columbia; six per cent. if payable in North Carolina, South Carolina, or Georgia; and nine per cent. if payable in any other part of the United States. One per cent. damages are also recoverable on bills for $100 or more drawn or endorsed in Massachusetts, and payable at any place in the State, if it be seventy-five miles or more distant from the place where the bill is drawn or endorsed. Mass. St. 1819, c. 41; St. 1820, c. 2.

In New York the holder of a bill drawn there payable at a place out of the United States, protested for non-acceptance or non-payment, is entitled to recover of the drawer or endorser, the amount of the bill at the rate of exchange on the place on which the bill was drawn, at the time of notice given to the party to be charged, and twenty per cent. damages on the amount of the bill at the rate of exchange, the expenses of the protest, and interest on the aggregate amount of the bill and damages from the time of notice given to the party to be charged. Hendricks v. Franklin, 4 Johns. R. 119; Weldon v. Buck, 4 Johns. R. 144; Graves v. Dash, 12 Johns. R. 17; Denston v. Henderson, 13 Johns. R. 322.

The rule formerly acted on by the Supreme Court of New York, was the same as that above stated, except that the amount of the bill was calculated at the par of exchange. Spencer J. says, "The twenty per cent. was in lieu of damages, in case of re-exchange, and because there was no course of exchange from London to New York, and to avoid the constant uncertainty and fluctuation of exchange." Hendricks v. Franklin, 4 Johns. R. 119. But this decision has been overruled by the Court of Errors, who have fixed the rule as above stated. Graves v. Dash, 12 Johns. R. 17.

Though the holder of a protested bill is entitled to recover at the rate of exchange at the time of notice given, the rate of exchange must be determined by the price of bills in gold and silver, not by the price in a depreciated currency. United States v. Barker, 1 Paine, 156.

The damages on bills drawn or endorsed in Maine, and payable within or out of the United States, are precisely the same as those above stated with regard to Massachusetts, previously to the statute of Massachusetts of March 6th, 1826. Laws of Maine, 318, statute passed Feb. 28th, 1821.

The damages on bills drawn in Connecticut or Delaware, payable out of the United States, returned protested, are twenty per cent. 3 Griff. Law Reg. 80; 4 Id. 1069.

The holder of a bill drawn or endorsed in Rhode Island payable in any place out of the United States, and returned protested for non-acceptance or non-payment, is entitled to recover of the drawer or endorser ten per cent. damages, charges of protest; and interest from the

tecedent debt, or a person to whom he endorses it after it is

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date of the protest. On bills drawn in the State, and payable in any other part of the United States, five per cent. damages, the charges of protest, and interest from the date of the protest, are recoverable. Laws of R. I. Ed. 1798, p. 444. See also Brown v. Van Braam, 3 Dall. 344.

The damages given on bills drawn or endorsed in Pennsylvania, payable out of the State and within the United States, (except in Louisiana), are five per cent.; if payable in Louisiana or any other place in North America or its islands, (except the northwest coast of America, Mexico, or any of the West India or Bahama islands), ten per cent.; if payable in Madeira, the Canaries, Azores, Cape de Verd Islands, Spanish Main, or Mexico, fifteen per cent.; in Europe or its islands twenty per cent.; in any other part of the world, twenty-five per cent. Interest is given in all these cases on the amount of the bill, damages, and charges of protest, from the time of notice; and the amount of the bill and damages is to be determined by the rate of exchange, or value of the money or currency mentioned in such bill, at the time of notice. 7 Laws of Penn. 434.

It was formerly held in this State that the holder of a bill protested for non-acceptance, but not for non-payment, was not entitled to the twenty per cent. damages, but only to such a sum as would purchase a new bill for the same amount, with interest from the time of notice. The Court in this case instructed the jury, that if no current rate of exchange was settled, there could be no safer rule than to give damages at the par of exchange. Taan v. Le Gaux, 1 Yeates, 204.

The damages on bills drawn in Ohio on persons living within the United States, and out of that State, returned protested for non-acceptance or non-payment, are ten per cent.; if drawn on persons out of the United States, fifteen per cent. 3 Griff. Law Reg. 404.

The damages in Indiana are the same as in Ohio. 3 Griff. Law Reg. 468.

The damages on bills drawn in Illinois payable out of the United States are twenty per cent.; on those payable within the United States ten per cent. 3 Griff. Law Reg. 424.

Upon a bill drawn in Maryland payable in any other State, duly protested, the holder can recover so much current money as will purchase a good bill on the same place at the current rate of exchange, and also eight per cent. damages upon the *value* of the principal sum mentioned in such bill, and costs of protest, and interest upon the value of the principal from the time of protest; and upon a bill payable out of the United States, the *value* of the bill is recoverable at the rate of exchange, fifteen per cent. of that value, damages, costs of protest, and interest on the value of the principal sum in the bill from the time of protest. State of Mar. 1785, c. 38. 1 Laws of Maryland, Maxcy's Ed. 558.

The holder can recover of the drawer enough to purchase another bill at the time of the verdict. Bryden v. Taylor, 2 Har. & John. 400.

The damages on protested bills, drawn in Virginia upon any place out of the United States, are fifteen per cent., and interest from the date of the protest. 1 Virg. Rev. Code, c. 77, s. 1. p. 113; 2 Virg. Rev. Code, c. 72, s. 1. p. 100. See Slacum v. Pomery, 6 Cranch, 221. The damages on inland bills returned protested are one per cent. 3 Griff. Law. Reg. 363.

dishonored, and who is acquainted with the circumstances,

Any bill drawn in Kentucky, on a person out of the United States, and protested, draws interest at the rate of ten per cent. from the date until paid; but not more than eighteen months interest from the date until it is presented protested to the drawer or endorser. Toulmin's Kentucky Laws, 267, Statute Feb. 6, 1798. No other damages are recoverable upon any bills drawn in Kentucky. 4 Griff. Law Reg. 1141.

On any bill drawn in Missouri payable out of the United States, returned protested, twenty per cent. damages are recoverable; and on a bill payable out of the State, and in the United States, ten per cent. 4 Griff. Law Reg. 627.

In North Carolina upon the protest of bill drawn in that State, payable out of the United States, ten per cent. interest is chargeable from the date until payment is made, but not more than eighteen months interest is allowed, previously to its being presented protested to the drawer or endorser. The *damages* on such bills are fifteen per cent. with costs and charges of protest; and the damages on the protest of bills drawn in the State and payable in the United States, are ten per cent. with costs, and charges of protest. 3 Griff. Law Reg. 225.

But the ten per cent. cannot be claimed, unless the bill is expressed to be "for value received." Anonymous, 1 Taylor's R. 118; and Anonymous, 2 Hayw. 101. See the Statutes cited in 3 Griff. 225.

The holder of any bill drawn in Tennessee, and protested, is entitled to recover ten per cent. interest from the date to the time of payment, but not more than eighteen months interest previously to its being presented protested to the drawer or endorser; and also fifteen per cent. damages on the sum expressed in the bill, with the costs and charges of protest. 4 Griff. Law Reg. 799.

The damages on bills drawn in South Carolina, and returned protested, if payable out of that State, and within the United States, are ten per cent.; if payable in any other part of North America or any of the West India Islands, twelve and a half per cent.; if payable in any other part of the world, fifteen per cent. In all these cases all charges, and interest from the time when the bill becomes due, are recoverable; and the damages are to be liquidated by the difference of exchange on the place where the bill is payable. St. S. Car. 1796, 1 Brev. Dig. 487.

The damages in Alabama and Louisiana are the same as in Missouri, stated above. 4 Griff. Law Reg. 586, 697.

In Mississippi ten per cent. damages are recoverable upon foreign bills drawn in that State and returned protested. 4 Griff. Law Reg. 670.

It is often made a question, by the law of what place the damages on a protested bill are to be regulated. See on this subject, Ch. A. anté.

Whether damages are recoverable in an action for the non-acceptance of a bill, unless where they are given by statute, is perhaps questionable. But where an action was commenced in New York on a bill payable in England, after notice of its non-acceptance had been received, and after a protest for non-payment, though before notice of it had been received, and the declaration contained a count on the non-payment as well as the non-acceptance, it was held that the twenty per cent. damages were recoverable. United States v. Barker, 1 Paine, 156.]

cannot recover the twenty per cent. damages against an endorser prior to the remitter. The remitter of the bill is the person entitled to the damages, "he having encountered all the hazard and inconvenience of the remittance." (q)

Where a bill was drawn, as additional security for a bottomry bond, previously given by the drawer, the captain of a vessel of which the drawee was owner, it was held that the drawer was not liable to damages on the dishonor of the bill. (r)

In an action by a party who has endorsed a bill for the accommodation of the drawer, against the drawer, he can, it seems, recover only the amount which he has been compelled to pay on the bill; and not damages, where he has not paid any. (s)

It is held that where the holder of a bill protested for non-payment, afterwards recovers the whole amount of the bill from the acceptor, he cannot recover damages of the drawer or an endorser; and if he receives a part of the amount of the

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[(q) Thompson v. Robertson, 4 Johns. R. 27.

In an action by the endorsee against the endorser of a foreign bill returned dishonored, it appeared, that the bill had been remitted by the defendant for the payment of goods which he had purchased of the plaintiff. The Court said, "The plaintiff ought not to be allowed the twenty per cent. damages: the practice on this point we believe to be settled. The reason for that allowance does not apply where a bill is remitted to pay an antecedent debt." Kenworthy v. Hopkins, 1 Johns. Cas. 107; S. P. Brown v. Jackson, 1 Wash. C. C. R. 512.

In this case the remitter of the bill who was sued had endorsed it, "pay the amount to order *for my use.*"

And where it appeared from a receipt of the payee of a bill, that when paid it was to be in full for the balance of an account due from the drawer to the payee, the bill being dishonored, it was held in Pennsylvania that the payee was not entitled to recover the twenty per cent. damages. Chapman v. Steinmitz, 1 Dallas, 261.

So where a bill had been remitted by the endorsers in payment of an antecedent debt, and being dishonored, the endorsees to whom it had been remitted, received from the drawer his note for the amount of the bill and twenty per cent. damages, and gave him up the bill, it was held that the endorsers might recover from their endorsees the amount of the twenty per cent. damages included in the drawer's note, notwithstanding his failure before it became due. Keppele v. Carr, 4 Dallas, 155.]

[(r) Hazelhurst v. Kean, 4 Yeates, 19.]

[(s) Dorsey & al. v. Their Creditors, 19 Martin, 498; Nolte & al. v. Their Creditors, 19 Martin, 9.]

acceptor, he can only recover damages on the remainder of the drawer or endorser. (*t*)

[It is held in New York that in an action against the endorser of a note, the fees of protest can be recovered as a part of the damages. (*u*) The law is probably the same in other States where it is customary to protest dishonored notes.

The endorser of a bill is not liable to pay the costs of a suit brought by the holder against the acceptor, or commissions paid by the holder to an attorney, for collecting part of the money from the acceptor. (*v*)]

The action usually brought on account of a bill or note, is a special action of assumpsit thereon; but, perhaps, a special action (52) of debt, debt on an indebitatus, or an (53) indebitatus assumpsit, might be maintained thereon.

[(*t*) Bangor Bank v. Hook, 5 Greenl. 174.]
[(*u*) Merritt v. Benton, 10 Wend. 116.]
[(*v*) Bangor Bank v. Hook, 5 Greenl. 174.]

(52) In Anon. Hardr. 485, it was held that the payee of a bill could not maintain debt against the acceptor, because there was no privity between them, and because the acceptance was a collateral undertaking only. [See also Smith v. Segur, 2 Hen. & Munf. 394; Wilson v. Crowdhill, 2 Munf. 302. But see Olive v. Napier, Cooke's R. 11, in which Campbell J. intimates that debt would lie by the payee against the acceptor.] In Welch v. Craig, Stra. 680. 8 Mod. 373, it was held that debt will not lie upon a note; but it does not appear by or against what particular party that action was brought. In 1 Mod. Ent. 812. pl. 13, it is said that debt will lie against the maker of a note, not against the endorser. And in Morgan's Precedents, 458, is an entry of a declaration in debt by the administratrix of the payee of a note against the maker; and in Rumball v. Ball, 10 Mod. 38, an action of debt was brought upon a note.

[In Indiana, debt lies for the assignee against the maker of a note. Taylor v. Walpole, 1 Ind. R. 378.]

(53) In Brown v. London, 1 Freeman, 14. 1 Mod. 285. 1 Vent. 152, it was held, that an indebitatus assumpsit would not lie upon the acceptance of a bill, Twisden J. dubitante. And there is a dictum to the like effect in Comb. 204. But in another report of Brown v. London, Lev. 298, the Court is stated to have resolved in favor of the defendant, because the custom was not set out in the count. In Skinn. 346, it is said, it will only lie against the drawer upon a bill importing to have been given for value received. In Salk. 125. 12 Mod. 37, it is laid down generally, that an indebitatus assumpsit will not lie upon a bill; and in 12 Mod. 345, it is held that the payee of a bill importing to have been given for value received, may maintain an indebitatus assumpsit against the drawer. And it may be observed, that the demand of an endorsee upon a bill or note against endorser, drawer, maker, or acceptor, is continually allowed as an item of set-off under the statutes of set-off.

And assumpsit will lie upon a bill or note against a corporation, where such corporation is empowered by statute to issue, endorse, or accept bills or notes. (54)

Debt (55) may be maintained by the payee against the maker of a note expressed to be for value received (56);

Or by the drawer against the acceptor, where the bill is payable to the drawer's order and expressed to be for value received. (56)

[And debt may be maintained by the endorsee against the maker of a note. (*w*)

An act of Ohio, passed February 18, 1820, authorizes the holder of a bill or note "to bring a joint action against all the drawers or endorsers, allowing the defendants to make the same separate defences as if separate suits were brought against them. It was held, that a joint action might be properly

(54) Murray v. East India Company, 5 B. and Ald. 204. Assumpsit against the East India Company as acceptors of certain bills of exchange: it was urged, that assumpsit could not be brought against a corporation; but the Court, without intimating how that would be in general, held, that as the East India Company was, by 53 G. 3. c. 155. s. 57, and other acts, expressly authorized to accept bills, those statutes were to be considered as virtually making them liable to the ordinary remedies upon bills, and consequently to the action of assumpsit.

(55) Bishop v. Young, 2 Bos. & Pull. 78. This was an action of debt by the payee, against the maker of a promissory note, expressed to be for value received. The first count of the declaration was upon the note; and upon general demurrer to this count, the Court, after time taken to consider, held, that in this particular case the action of debt was maintainable. But Lord Eldon, who delivered the opinion of the Court, said, "We do not say how the case would stand if the action were brought by any other person than he to whom the note was originally given, or against any other person than him by whom it was signed and made, or if the note itself did not express a consideration upon the face of it." Judgment for the plaintiff.

[The case of Lindo v. Bank of Alexandria, 1 Cranch, 343. is contra. But see a note to this case in 1 Cranch, Appendix, 462.]

(56) Priddy v. Henbrey, 1 Barn. & Cr. 674. Debt against the acceptor on a bill for 30*l*., drawn by plaintiffs, payable to plaintiffs or their order, importing to be for value received in goods. Demurrer, and it was urged, that the action of debt was not maintainable; but, on argument and time to consider, Holroyd and Bayley Js. before whom alone it was argued, held, that as the bill imported to be for value received, and as the action was by drawer against acceptor, between whom there was immediate privity, the action was maintainable, and judgment for plaintiff.

See also Thompson v. Morgan, post, p. 392, n. (59).

[(*w*) Willmarth v. Crawford, 10 Wend. 341. But Olive v. Napier, Cook's R. 11, is contra.]

brought against the maker and endorsers of a note under this statute, in the Circuit Court of the United States for the District of Ohio, the practice of suing in this mode having been adopted in that court after the passage of the act. (x)]

But instead of suing upon the bill or note, the holder may use it merely as evidence in another action.

A bill is prima facie evidence of money lent by the payee to the drawer; and a note, of money (57) lent by the payee to the maker; and each, consequently of money (58) had and

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[(x) Fullerton v. Bank of the United States, 1 Pet. Sup. C. R. 604; Williams v. The Bank of the United States, 2 Pet. Sup. C. R. 96.]

(57) Clarke v. Martin, Lord Raym. 758. Holt C. J. expressed his disapprobation of declaring upon promissory notes (before the statute) as if they were within the custom of merchants; and assigned as a reason, "because there was so easy a method as to declare upon a general indebitatus assumpsit for money lent." The same was laid down in 12 Mod. 380. and in Burr. 1525. Lord Mansfield says, "I do not find it any where disputed, that an action upon an indebitatus assumpsit generally, for money lent, might be brought on a note payable to one or order." And see Smith v. Kendall, ante, p. 29, n. (73).

(58) Grant v. Vaughan, Burr. 1516. The bearer of a note payable to "Ship Fortune or bearer," brought an action upon it, and inserted a count for money had and received. Lord Mansfield left it to the jury whether such a note was negotiable, and whether the plaintiff took it fairly, and they found for the defendant; but upon a rule nisi for a new trial, the Court was clear the first point should not have been left to the jury; and per Lord Mansfield, "Upon the count for mony had and received, the case is clear beyond dispute; for undoubtedly an action for money had and received to the plaintiff's use, may be brought by the bonâ fide bearer of a note payable to bearer. It was certainly money received for the use of the original advancer of it, and if so, it is for the use of the person who has the note as bearer;" and Wilmot and Yates Js. expressed themselves to the same effect. A new trial was granted, and the plaintiff recovered.

[S. P. Penn v. Flack, 3 Gill & Johns. R. 369.

So it was held that the holder of a note payable to Wm. Douglass or bearer might recover against the maker on the money counts. Pierce v. Crafts, 12 Johns. R. 90.

If the second endorser of a note pay part of the sum due upon it, to the holder, who retains possession of it, he may recover the amount so paid, of the first endorser, on a count for money paid to his use; but in such case the second endorser not having possession of the note, cannot maintain an action upon the note itself. Butler v. Wright, 20 Johns. R. 367.

If after bringing the suit he makes a further payment on the note, he may bring a new action for the amount against the first endorser. Wright v. Butler, 6 Wend. 284.

The statute of limitations, it seems, would be a bar to such an action, if the payment was made after the first endorser had been discharged from his liability by the lapse of time. Wright v. Butler, 6 Wend. 284.

received by the drawer or maker to the use of the holder, and of money paid by the holder to the use of the drawer or maker.

It was held that the *bonâ fide* holder for a valuable consideration of a check, marked *memdm.* [memorandum] the printed name of the bank to which it was addressed having been cancelled, and payable to Capt. Cazneau or bearer, might maintain an action for money had and received against the drawer. Ellis v. Wheeler, 5 Pick. 18. It is very common in Boston, and perhaps in other places, where money is lent for a few days, for the borrower to give the lender a printed check, filled out with the sum lent, the name of the bank being struck out and the word *memorandum*, or an abbreviation of it, written in its place.

A check upon a bank may be given in evidence on the money counts, in an action by the bearer against the drawer. Cruger v. Armstrong, 3 Johns. Cas. 5.

It is evidence of money had and received by the drawer to the use of the holder, and of money paid by the holder to the use of the drawer. Murray v. Judah, 6 Cowen, 484.

A check upon a bank drawn by a person borrowing money, in favor of the lender, both parties knowing there were no funds in the bank, and it not being intended to be presented there, is evidence of money borrowed, and the amount of the check is recoverable on the money counts. Cushing v. Gore, 15 Mass. R. 69.

So a note may be given in evidence on the money counts, in an action by the payee against the maker. And the plaintiff is entitled to recover, though the defendant has fraudulently obtained possession of the note. Arnold v. Crane, 8 Johns. R. 62.

So a note for a certain sum payable in certain lands may be given in evidence under the money counts, in an action by the payee against the maker, where the latter is unable to convey the lands from defect of title. Smith v. Smith, 2 Johns. R. 235.

Some of the American cases go further than the English, and consider a bill or note not merely *primâ facie*, but conclusive evidence of a money consideration between the parties.

Thus in Hughes v. Wheeler, 8 Cowen, 77, it was held, that a promissory note, in an action by the payee against the maker, was conclusive evidence under the common money counts, and evidence that the note was not given for a pecuniary consideration, but for land purchased by the maker's brother, was held to be inadmissible. From this decision Sutherland J. dissented, regarding the note as only *primâ facie* evidence of money had and received by the maker for the use of the payee. In this action, beside the money counts, was a count on an insimul computassent. It appears, however, from the report that the majority of the Court considered the note as "conclusive" evidence under the common counts.

In New York the endorsee of a note may recover on the common money counts in an action against the maker, although the evidence shows no money transaction between them, but that the plaintiff is suing as the mere agent of the party in interest. Olcott v. Rathbone, 5 Wend. 490.

So in Massachusetts it is held, that an endorsee of a note may maintain an action for money had and received against the maker, though the maker signed it merely for the accommodation of the payee, and received neither money nor any other consideration for signing it. Cole v. Cushing, 8 Pick. 48.

An acceptance is (59) also primâ facie evidence of money had and received by the acceptor to the use of the holder, and

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And it is now settled in Massachusetts, that an endorsee of a note may maintain an action for money had and received against any prior party. Ellsworth v. Brewer, 11 Pick. 316; State Bank v. Hurd, 12 Mass. R. 172.

In an action against a surviving partner, the notes of the partnership may be given in evidence in support of the money counts. Neal v. Fisher, 2 Har. & Gill, 274.

See also Eagle Bank of New Haven v. Smith, 5 Conn. R. 71.

In an action against A., a note of which A. & B. are the makers, payable to the plaintiff, is evidence on the money counts, the non-joinder of B. being, as in other cases, only pleadable in abatement. Williams v. Allen, 7 Cowen, 317.

A note payable to bearer signed with a partnership name, in an action by the holder against the makers, is evidence under the money counts, though they contain no allegation of partnership between the defendants. Mack v. Spencer, 4 Wend. 411.

A negotiable note is evidence on the count for money paid, in an action by the endorsee against the maker. Wild v. Fisher, 4 Pick. 421. The declaration in this case also contained a count for money lent. The report does not show whether the note was not considered evidence on both counts.]

(59) Tatlock v. Harris, 3 Term Rep. 174. In an action by the endorsee of a bill payable to a fictitious payee against the acceptor, who was also one of the drawers, the declaration contained counts, for money paid, and for money had and received; it appeared upon the evidence, that the defendant was indebted to one of the endorsers, and sent him this bill, for which he was credited in account, and that the plaintiff paid *that* endorser the value of the bill; and upon a demurrer to the evidence, the Court held that the plaintiff was entitled to recover under the counts for money paid and money had and received, and he had judgment accordingly.

Vere v. Lewis, 3 Term Rep. 182. This was a similar action to that of Tatlock v. Harris, except that the defendant was not one of the drawers, and there was no evidence that he received any value for the bill; upon which it was urged the plaintiff could not recover upon the money counts; but the Court said the acceptance was evidence that he had received value from the drawers, and the plaintiff had judgment.

Thompson v. Morgan, 3 Campb. 101. Plaintiff drew on defendant, payable to plaintiff or order: defendant accepted: plaintiff sued on the acceptance, but there being a variance between the bill as stated, and the real bill, plaintiff resorted to the money counts. Lord Ellenborough at first doubted, because indebitatus assumpsit would not lie on the bill against the acceptor; but it being pointed out to him that plaintiff was drawer and payee, so that there was no intermediate party between plaintiff and defendant, he admitted the bill as evidence under the count for money had and received; but he would not allow interest. Verdict for plaintiff. See also Priddy v. Henbrey, ante, p. 389, n. (56).

[S. Penniman drew on J. Penniman in favor of A. Penniman, or order, for the net proceeds of certain notes in the hands of its drawee after deducting his own demands. A. Penniman accepted the order.

of money paid by the holder to the use of the acceptor; and (60) an endorsement, of money lent by the endorsee to the endorser.

But if it appear that, at the time of accepting, the drawee says he has nothing in his hands except a bill of the drawer's for a larger amount, but that he expects the drawer will remit, and will therefore take all risks upon himself, the acceptance will not be evidence of money had and received by the acceptor to the use of the holder, unless there be proof that the larger bill has been paid (61);

Or other money remitted;

With that proof, it will. (61)

It was held that an endorsee of the payee might maintain an action for money had and received, against the acceptor. Story J. said, "It is true, that the instrument is not negotiable. But by his acceptance the defendant undertook to hold the proceeds, after deducting his own demands, for the account of such person as should by the endorsement of the payee on the draft entitle himself to the proceeds. The plaintiff is the regular endorsee or appointee of the payee, and after notice of this fact, the defendant must be considered as holding money for his use; and under such circumstances the law will imply a promise to pay the same over to him." Weston v. Penniman, 1 Mason, 306.

In Eales v. Dicker, (Exeter Spring Assizes, 1829,) 1 Mood. & M. 324, which was an action by an endorsee against acceptor, the bill being offered as evidence on the count for money had and received; Littledale J. said, he was so decidedly of opinion that it was not evidence of money had and received by the acceptor to the use of the holder, that he would not grant leave to move to enter a verdict: he knew it was sometimes supposed to be evidence to that effect, but he thought it against principle. Verdict for defendant. A rule to set aside the verdict, as against evidence, was obtained, and made absolute; but no objection was made to the ruling of Littledale J. at the trial.]

(60) Kessebower v. Tims, B. R. Pasch. 22 Geo. 3. Lord Mansfield held, that the endorsee of a note might maintain indebitatus assumpsit for money lent, against the person who endorsed it to him.

[Although a note be *primâ facie* evidence under a count for money had and received, in an action against an endorser; yet where he is merely an accommodation endorser, and the money for which the note is made, is paid to the maker, and for his sole use, the endorser is held not liable on such a count. Page v. The bank of Alexandria, 7 Wheat. 35. But see Cole v. Cushing, and other American cases in the last note.]

(61) Whitwell v. Bennett, 3 Bos. & Pull. 558. In an action by the endorsee against the acceptor of a bill, the bill was incorrectly stated, and the plaintiff was, therefore, obliged to resort to the money counts. The evidence was, that when the defendant accepted the bill (which was for 30*l.*), he said, that though the drawer had not remitted to him, he expected that he would, and that, as he had a bill of his for 80*l.* which would be paid, he would take all risks upon himself. Lord

Proof that the drawee has received a remittance from the drawer specifically for payment of the bill, will also make the drawee, though he has not accepted the bill, answerable to the holder for money had and received, if he have done any thing which can be deemed a pledge to the holder for so applying it.

And proof that the acceptor's banker has received the money from the acceptor specifically for the bill, will make the banker liable to the holder for money had and received, if he do any thing which can be deemed a pledge to the holder. (62)

Taking the bill as agent to the holder, to receive payment thereon if payment be offered, is such a pledge, and will make him answerable for money had and received, if the money be paid to him whilst the bill is so in his possession;

At least if it be owing to such possession that he receives the payment. (62)

But, a specific remittance will not make the drawee, if he

Alvanley directed a verdict for the plaintiff, with liberty to the defendant to move for a nonsuit. Rule nisi accordingly; and on showing cause against this rule, it was urged, that if the bill for 80*l.* was paid, the defendant was liable as for money had and received: and that as the defendant had not at the trial produced that bill, the presumption was, that it was paid. The Court said, that if that bill was paid, the action for money had and received would be maintainable, on the ground of the defendant's specific appropriation of that money to the payment of the plaintiff's demand: but that the declaration being upon the bill for 30*l.* it was a surprise upon the defendant to call for proof of the non-payment of the other bill; and that, therefore, it would be too much to presume payment of that bill. Rule absolute.

(62) De Bernales v. Fuller, 2 Campb. 426. 14 East, 590. n. Plaintiff held a bill accepted by Fuller, payable at defendants', Puller's bankers: plaintiff sent the bill to his own bankers, and they, according to the course amongst bankers, sent it to defendants'. Puller found the bill was at defendants', and sent the money there to pay it: defendants' clerk took the money, but refused to give up the bill, and defendant insisted on keeping the money for a debt Puller owed them. Plaintiff thereupon brought an action for money had and received. Lord Ellenborough thought it not maintainable, and the defendants had a verdict; but, on an application for a new trial, and cause shown, the Court held that, as defendants made themselves agents for plaintiff by taking the bill from his bankers, and as they would not have had the money paid them had they not had possession of the bill, they were not at liberty to say they did not receive the money for plaintiff's use: a new trial was accordingly granted, and plaintiff afterwards had a verdict.

do not accept, answerable to the holder as for money had and received, unless there be something which can be deemed a pledge to the holder; without such pledge there is no privity between the holder and the drawee, and the drawer is the only person who can call the drawee to account for the misapplication. (63)

An acknowledgment by the acceptor of his liability under his acceptance will enable the holder to recover against him upon a count for the account stated. (64)

Against the very person also from whom he received the bill or note, the holder may sue for the consideration upon which the bill or note was given, if it were given for a pre-existing demand. (*y*)

For, in general, a bill or note is (65) no satisfaction of any

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(63) Yates v. Bell, 3 Barn. & Ald. 643. Ingram remitted 800*l.* to defendant to take up, amongst others, a bill for 743*l.*, but that bill being returned dishonored, defendant wrote to Ingram that he should carry the money to his credit: the bill coming back, the holder brought an action against the defendant for money had and received, on the ground that defendant was bound to apply the money to his bill. Abbott C. J. thought he was not, and nonsuited, and on a rule to show cause why the verdict should not be entered for plaintiff, and cause shown, the Court held the nonsuit right, for there was no privity between plaintiff and defendant, unless defendant assented to apply the money as Ingram directed; if he did not follow Ingram's directions, he might be accountable to Ingram, but not to the plaintiff, and the rule was discharged.

Stewart v. Frye, 7 Taunt. 339. A bill made payable at defendant's was dishonored for want of advice; the same day defendant received the money from Aspinall, the acceptor (qu. ?), to pay it, and he sent to plaintiff, who had presented it, but the bill was returned to Ireland. Aspinall called back the money, and defendant paid him; the bill came back to plaintiff, and he sued defendant for the money; the jury found for defendant, and on rule nisi for a new trial, the Court held the verdict right, and discharged the rule.

S. P. upon a remittance to pay a common debt, Williams v. Everitt, 14 East, 582. [See also Wedlake v. Hurley, 1 Crom. & Jer. 82. See Mandeville v. Welch, antè, p. 36.]

(64) Highmore v. Primrose, 5 M. & S. 65. In an action against the acceptor of a bill, plaintiff was precluded by a variance from recovering on the special count, but he proved that defendant had acknowledged the acceptance and pleaded inability to pay; and upon the point reserved, the Court held this entitled plaintiff to a verdict on the count for the account stated, and he had judgment accordingly.

(65) Puckford v. Maxwell, 6 Term Rep. 52. The defendant having been arrested by the plaintiff for 80*l.*, gave a draft for 45*l.*, and promised in a few days to settle the remainder, on which the plaintiff consented to his being discharged out of custody. The draft was dishon-

debt or demand for which it has been given; it is only primâ facie evidence of payment, rendering it necessary that the party receiving it should (66) account for it, before he will be entitled to recover the consideration. (*y*)

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ored, and the defendant was again arrested on the same affidavit. On rule to show cause why he should not be discharged out of custody, and cause shown, it was urged that the draft, having been accepted as part payment, could not be treated as a nullity. But per Lord Kenyon: "In cases of this kind, if the bill which is given in payment, do not turn out to be productive, it is not that which it purports to be and which the party receiving it expects it to be; and, therefore, he may consider it as a nullity, and act as if no such bill had been given.—These questions have frequently arisen at nisi prius, where they have always been determined the same way." Rule discharged.

Owenson v. Morse, 7 Term Rep. 64. The plaintiff bought some plate of the defendant, and gave him some country bank notes in payment; the notes were dishonored, on which the defendant refused to deliver the plate. The plaintiff brought trover, and insisted that the notes were payment; but on a case reserved, the Court held that they were no payment unless the defendant had agreed to take them as payment, and to run the risk of their being paid. Nonsuit entered.—See also Tapley v. Martens, 8 Term Rep. 451.

[The vendor of flour agreed to take the note of Lyon in payment. The vendee a few days after tendered Lyon's note, and demanded the flour; the vendor refused to deliver it, Lyon having failed in the mean time. It was held that no action lay for not delivering the flour.—Spencer J. delivered the opinion of the Court. "The offer by the plaintiff to pay in the note of a bankrupt, was not an offer of payment. On an agreement to accept notes in payment, if before the delivery of the articles purchased the notes turn out not to be good, a tender of them is not to be considered payment, unless it was part of the agreement to take them as such, and to run the risk of their being paid. Roget v. Merritt, 2 Cain. R. 117.]

(66) Kearslake v. Morgan, 5 Term Rep. 513. Assumpsit for goods sold and delivered, and for money lent. The defendant pleaded the general issue; and that as to 4*l.* 14*s.* 6*d.* one W. P. made his note for 10*l.* payable to the defendant or order, at a time which elapsed before the commencement of the suit: and that the defendant, before the note became due, endorsed it to the plaintiff "for and on account of the said sum of 4*l.* 14*s.* 6*d.* and the sum of 5*l.* 5*s.* 6*d.*," paid by the plaintiff to the defendant, and that the plaintiff accepted the note "for and on account of" those sums. To this plea there was a general demurrer, and it was urged, that the plea ought to have alleged that the note was received in *satisfaction* of the debt. But the Court, on argument, held the plea good; as the note might be outstanding and a demand might be made upon it; and they advised plaintiff to withdraw his demurrer, and reply; which he did.

Dangerfield v. Wilby, 4 Esp. N. P. C. 159. The declaration contained a count upon a note made by the defendant, payable to the plaintiff and the money counts. At the trial the note was stated to have been lost, but no evidence of that fact was offered. It was prov-

ed, however, that on the money being demanded, the defendant had apologised for not having paid the money *on account of the note.* This was the whole of the plaintiff's case; and he contended that the note was only evidence of the consideration (which was stated to have been money lent), and that he might abandon the note, and go for the consideration. But Lord Ellenborough said, that as the note for any thing that appeared in evidence was in existence, it might still be in circulation, so that the defendant might be subjected twice to the payment of the same demand; without, therefore, proving the note lost, the plaintiff was not entitled to recover. Nonsuit. See Champion v. Terry, post.

[(y) The principles stated in the text are recognised in a great number of American cases.

See Pintard v. Tackington, 10 Johns. R. 104; Glenn v. Smith, 2 Gill & Johns. 493; Prescott v. Hubbell, 1 M'Cord, 94; Barelli v. Brown, 1 M'Cord, 449; Bill v. Porter, 9 Conn. 23; M'Evoy v. Baltimore, 3 Har. & John. 193; Clark v. Young, 1 Cranch, 181. In the last case it was held that an action might be commenced on the original cause of action, without proving an offer to return the note before the institution of the suit.

Where the attorney of the plaintiff took the note of the sheriff for the amount of an execution, without agreeing that it should be payment, and without giving a discharge of the execution, it was held that the execution was still valid against the judgment debtor, and that the usual remedies on the execution might be pursued for the benefit of the sheriff, by leave of Court. Cheever v. Mirrick, 2 N. Hamp. R. 376.

Barber being indebted to Tobey for rent, procured Coffin to give a note payable to Tobey or order in four months for a part of the amount. Tobey gave a receipt in full for the rent. Coffin failing, the note was not paid. Tobey then sued Barber for the rent. Per Curiam. "The taking of the note was no extinguishment of the debt due for the rent. It is a rule well settled and repeatedly recognised in this court, that taking a note either of the debtor or a third person, for a pre-existent debt, is no payment, unless it be expressly agreed to take the note as payment, or unless the creditor parts with the note, or is guilty of *laches*. There is no evidence in this case, that the plaintiff agreed to run the risk of the solvency of Coffin, and to take the note as absolute payment, except it be the receipt itself, and that is not enough to establish such a positive agreement." Tobey v. Barber, 5 Johns. R. 68.

Murray and Co. being indebted to Governeur and Kemble in the sum of $5000, as the first instalment, on an agreement of the latter to sell a house to the former, Governeur and Kemble purchased of Murray and Co. bills drawn by them on one of their partners in London to the amount of $25,000, and on paying for the same, deducted $5000, and gave a receipt for the same as the first instalment. The question was, whether this was a payment of the first instalment, the bills being dishonored, and the evidence not showing that it was agreed to be considered as payment. Kent J. said, "It is a settled rule that a bill shall not be a discharge of a precedent debt, unless it be so expressly agreed by the parties." Murray v. Gouverneur, 2 Johns. Cas. 438.

A mortgage was given to secure payment of a note, the note was afterwards taken up, and a new note given for the same sum and interest to the date of the new note; it was held that the mortgage was not

thereby discharged; as the first note was not *paid*. Elliot v. Sleeper, 2 N. Hamp. R. 525.

Where the defendant had given his note to the plaintiffs on account of a pre-existent debt, in an action for the original debt, Spencer J., who delivered the opinion of the Court, said, "Technically speaking a negotiable note or bill of exchange is not an extinguishment of an antecedent debt: yet it has been held an extinguishment *sub modo*. In the King's Bench, a note or bill has been held to be an extinguishment of a simple contract debt, the defendant being liable to pay the money to a third person." He said he was disposed to adopt this rule with this qualification, "that where a negotiable note has been given for a prior debt, not to suffer the plaintiff to recover on the original consideration, unless he shows the note to have been lost, or produces and cancels it at the trial." The Court directed the plaintiffs to cancel the note, and file it with the Court, which was accordingly done. Holmes v. De Camp, 1 Johns. R. 34.

In another case it was held that giving a note was not payment of a book-debt;—and that it only suspended the right of action during the period allowed for payment of the note: and that the note not having been paid, the plaintiff was entitled to recover the amount of the book-debt, with *interest* from the time the note was payable. Putnam v. Lewis, 8 Johns. R. 304.

In an action for the original cause of action for which a negotiable note has been given, if the note be not produced at the trial, the objection to maintaining the action for this cause must be taken at the trial. Where the note was not produced at the trial and no exception taken, the Court of Errors of Connecticut refused to grant a new trial. Bill v. Porter, 9 Conn. 23.

An action was brought in Massachusetts for goods sold and delivered in New York. The evidence at the trial showed that the defendants had given a negotiable note to the plaintiffs for the price of the goods, payable in four months, and that the plaintiff had given a receipt, stating that the note was received in full for the goods. It was also proved that the note had been lost. It was held that the plaintiff was entitled to recover, as the contract was made in New York, and therefore regulated by the laws of that State. Vancleef v. Therasson, 3 Pick. 12.

Where, by express agreement, a note is taken in payment of a judgment, it is an extinguishment of the debt. New York State Bank v. Fletcher, 5 Wend. 85.

Where a bank note is received in payment of a debt, and at the time of the payment the bank has stopped payment, though the fact is not known to the parties, the loss must fall on the person paying the note, and not on the one receiving it. Lightbody v. Ontario Bank, 11 Wendell, 9.

To the common counts in assumpsit the defendant pleaded that he had given his promissory note to the plaintiff for the same promises, which the plaintiff received in full satisfaction, and which the plaintiff had endorsed and delivered to a third person. Spencer J. "The plea is defective, for the mere giving of a negotiable note, or its endorsement to a third person, does not extinguish the original cause of action, provided the payee can show it to be lost, or can produce it to be cancelled; and *non constat* that it cannot be done in this case." Burdick v. Green, 15 Johns. R. 247. S. P. Hughes v. Wheeler, 8 Cowen, 77.

The borough of Bridgeport being indebted to Davidson for a clock,

a committee of the borough gave him drafts on the treasurer for the amount, which drafts, together with his claim against the borough, he endorsed to Perry. The treasurer refused to accept the drafts. It was held that an action in Davidson's name for the price of the clock, brought for the benefit of Perry, the drafts being brought into court at the trial, might be maintained, and that the endorsement was no bar to the plaintiff's recovery. Davidson v. Borough of Bridgeport, 8 Conn. R. 472.

Where a usurious note was given, the consideration for which was a valid note which the parties destroyed, it was held that an action might be maintained for the consideration of the original note. Hughes v. Wheeler, 8 Cowen, 77.

It has been held in various cases that a receipt in full, is open to explanation, and does not preclude the creditor from showing the circumstances under which it was given. Putnam v. Lewis, 8 Johns. R. 304; Tobey v. Barber, supra; Johnson v. Weed, supra; Bartsch v. Atwater, 1 Conn. R. 409; Glenn v. Smith, 2 Gill & Johns. 493.

Where a person receives a note on settlement of an account, and gives the debtor the following receipt thereon, "Received payment by note," signed by himself, the receipt is prima facie evidence of payment. Hutchins v. Olcott, 4 Vern. R. 549.

A note thus taken where it is intended to be in payment of the account, discharges a lien which the creditor had on certain articles for labor on them which was charged in the account. Ibid.

In Louisiana if a creditor gives a receipt for a bill or note in payment of an account, the debt is novated, that is, in the language of the common law, the account is paid by the bill or note. Hunt v. Boyd, 2 Miller, 109.

On a note's falling due the holder received from the maker a check of a third person, for a part of the amount, and a new note for the remainder, and delivered up the old note. The check being dishonored, it was held that an action might be maintained on the original note against the maker to recover the amount of the check; and that the mere fact of delivering up the old note was not of itself sufficient evidence that the new note and check were received in payment. Olcott v. Rathbone, 5 Wend. 490.

It has been decided in many cases that taking the note of one partner or joint debtor, does not of itself discharge a prior debt. Herring v. Sanger, 3 Johns. Cas. 71.

Townsend, one of the owners of the ship Eleanor, ordered supplies for her, which were furnished by the plaintiffs, and charged in their books to "Ship Eleanor, Mr. George Townsend and owners," and he some time after gave his note to the plaintiffs for the amount, who gave him a receipt which stated that they had received his note in full for supplies of ship Eleanor. Townsend died, and his estate proved insolvent. The plaintiffs then brought this suit against the other owners of the Eleanor, for the supplies furnished. It did not appear that the plaintiffs knew at the time of the sale that the defendants were part-owners. Per Curiam. "The taking of the note of Townsend, and giving a receipt in full, is no extinguishment of the original debt, unless the note was paid. There is no evidence that the plaintiffs *knew* that the defendants were part-owners. The case of Reed v. White, proceeds on the ground that the plaintiff had taken the ship's husband exclusively for his debtor, knowing there were other owners, and after a settlement of account between them and the ship's husband." Judgment for the plaintiffs. Schemerhorn v. Loines, 7 Johns. R. 310.

Rogers and Bement, being partners, were indebted to Smith and Mar-

shall. April 22d, 1816, Bement wrote to Smith and Marshall, that their firm was dissolved, and that he had assumed the debt due to Smith and Marshall. Smith and Marshall in reply wrote, "We observe your partnership is dissolved, and that you have assumed our debt, which we are satisfied with." Bement afterwards paid part of the money, which he directed to be placed to "the credit of the late firm of Rogers and Bement," and August 15th, 1816, gave his note to Smith and Marshall for the balance, and they gave him a receipt for the note, "when paid to be placed to the credit of Rogers and Bement." Bement became insolvent in November, 1817. Smith and Marshall then sued Rogers and Bement on the original contract, having never sued Bement or made any demand on Rogers, until after Bement's insolvency. Bement's note had been assigned, and this action was brought for the benefit of the assignees. The court were of opinion that nothing had been done by the plaintiffs which discharged the firm of Rogers and Bement; and said there must be judgment for the plaintiffs, on their filing the note given by Bement with the clerk of the court, to be cancelled. Smith v. Rogers, 17 Johns. R. 340.

Muldon and Montgomery furnished stores for the ship Cadmus, owned by Jenkins and Son, and Whitlock and Jenkins, and about two months after the sale took the notes of the ship's husbands, Jenkins and Son, at twelve months for the amount, giving a receipt which declared the note to be received "*in full* for stores for ship Cadmus." The note not being paid, and Jenkins and Son becoming insolvent, Muldon and Montgomery brought an action for the stores against all the owners. Muldon and Montgomery knew Whitlock and Jenkins to be part owners when the stores were furnished. Jenkins and Son had charged these stores in their account with Whitlock and Jenkins, but the account was never settled, and Whitlock and Jenkins had never paid Jenkins and Son any thing on account of the stores. Sutherland J. "No principle of law is better settled than that taking a note from *one of several joint debtors* or *from a third person*, for a *pre-existing debt*, is no payment, unless it *be expressly agreed to be taken as payment, and at the risk of the creditor.* Nor does the taking a note and giving a receipt for so much cash, in full of the original debt, amount to evidence of such express agreement to take the note in payment. Jenkins and Son gave their note as the agents of the defendants. It was *their* note in judgment of law; and not having been paid, the plaintiffs have a right to resort to the original cause of action." He seemed to think it of no consequence that the plaintiffs knew who were the other owners. "The defendants have not been misled or injured in consequence of the manner in which the plaintiffs dealt with Jenkins and Son. They have not settled with them upon a different principle, or paid them money, which they would not otherwise have done." Judgment for the plaintiffs. Muldon v. Whitlock, 1 Cowen, 290.

Kean and Foster, being partners, owed Dufresne a note. Their partnership being dissolved, Kean gave his own note to Dufresne, and Dufresne got it discounted, and applied the proceeds to the credit of Kean and Foster. Dufresne had to take up this note himself, and then sued Kean and Foster on their note. Per Curiam. "The note set up as an extinguishment of the debt of Kean and Foster, was not parted with by Dufresne, but for the purpose of raising money for Kean and Foster. Therefore it can be no extinguishment." Kean v. Dufresne, 3 Serg. and Raw. 233.

Chapman v. Durant, 10 Mass. R. 47, is contra.

But where there are several joint debtors, taking the note of one for

the amount of the debt, discharges the others, if the note was taken as payment, and with the intent to discharge the others. Higgins v. Packard, 2 Hall, 547.

Some of the above cases make a distinction between a note given for a pre-existing debt, and one given at the time of contracting the debt; but it appears from the following cases that a diversity of opinion exists as to the propriety of this distinction.

In an action for goods sold, it appeared that a note of a third person had been taken and a receipt given, and there was evidence on both sides as to the agreement of the vendor in taking the note, and the jury found for the plaintiff. The Supreme Court of New York refused to set aside the verdict; and the court said, that taking the note of a third person for goods sold is no payment, if it turns out afterwards to be of no value, "unless there be a clear and special agreement that the vendor shall take the paper absolutely as payment." Johnson v. Weed, 9 Johns. R. 310.

Van Ness agreed to give Whitbeck $90 for a horse, if he would take Deane's note in payment, payable in six months; Whitbeck took the note of Deane payable to Whitbeck himself, and delivered the horse. Deane not paying the note at maturity, Whitbeck sued Van Ness for the price of the horse. The court held that "the note of a third person, agreed to be taken in payment for goods sold at the same time, was taken at the risk of the vendor of the goods," and consequently that the action was not maintainable. And Spencer J. said, "Though I assented to the decision in Johnson v. Weed, and still believe it to be correct, the reasoning of the judge who gave the opinion went further than I intended, and as I understand those of my brethren who assented to the decision, further than they meant to go." Whitbeck v. Van Ness, 11 Johns. R. 409. But see Bartsch v. Atwater, 1 Conn. R. 409.

The bill or note of an agent given for a debt of his principal, at the time of contracting it, does not discharge the right of action against the principal.

N. Talcott, as agent of Talcott and Bowers, exchanged a ship of theirs for a brig of U. and C. Porter; and gave the notes of N. and D. Talcott, under which name he traded, payable at different times, for the difference in value between the brig and ship. N. Talcott failed before the notes became due, having charged Talcott and Bowers with the difference in value between the vessels, and being largely indebted to them. In an action against Talcott and Bowers after the maturity of the notes, the jury found that there was "no evidence of any agreement or mutual understanding, that the said Talcott and Bowers were or were not bound to the plaintiffs for the amount of the notes of N. and D. Talcott in the event of their insolvency." Woodworth J. "Is N. Talcott to be considered a third person within the meaning of the rule laid down in Whitbeck v. Van Ness? He was an agent merely, and represented the defendants. The note of Talcott is not the note of a third person, nor does it operate as payment unless so agreed. I am on the whole of opinion, as Talcott was merely an agent, and as there does not appear to have been any agreement not to look to the defendants, they are liable. Sutherland J. was of the same opinion as far as regarded the principal case, though he seems to think that the note of a third person is not payment of a debt cotemporary with the giving of the note, any more than of an antecedent debt, unless there is an express agreement to receive it as payment. Porter v. Talcott, 1 Cowen, 359.

But where an agent received property of his principal out of which to pay a debt due from the principal to a third person, and the creditor took the note of the agent payable at a future day, and the agent failed before the note became due, having sold the property, and the creditor joined with other creditors of the agent in discharging him; it was held that the creditor could not maintain an action against the principal on his original demand, because he had trusted the agent beyond what the principal did, and without his consent. Tudor v. Whiting, 12 Mass. R. 212.

Where an agent bought goods for his principal, but without disclosing his name, received a bill of parcels headed "*Mr. A. B. agent, bought of*," &c., and drew a bill on another person for the price, signed "*A. B. agent*," which was dishonored, it was held that the seller could recover the price of the goods of the principal, if the jury were satisfied that the goods were not sold on the exclusive credit of the agent. Pentz v. Stanton, 10 Wend. 271.

Where an agent gives his own draft for a claim on his principal, receiving a receipt for so much money on account of the principal, and the draft is dishonored, the party has still a claim against the principal, unless it appears that he has been injured by this mode of dealing with his agent. Wyatt v. Hutford, 3 East, 147.

The Patapsco Insurance Company v. Smith, 6 Harris and Johnson, 166. The note of B. with a surety, was taken for a debt due from him as the agent of C. and D., and the payee at the time had reason to suppose that he was an agent, but did not then know who his principals were, and before the note became due, C. and D. paid to B. the amount. It was held that C. and D. were not afterwards liable to the holder on the original consideration.

A note of a third person, given in payment for a debt, will not operate as a payment, where the note was made on an illegal consideration, which renders it void in the hands of the holder. Beard v. Brandon, 2 Nott and M'Cord, 102.

In Massachusetts it has been held that a negotiable note given in consideration of a simple contract debt due, is a discharge of the simple contract. Thacher v. Dinsmore, 5 Mass. R. 299; Chapman v. Durant, 10 Mass. R. 47; and Wiseman v. Lyman, 11 Mass. R. 369.

In the case of Maneely v. M'Gee, Parsons C. J. says, "At common law a promissory note given by a debtor to pay his creditor a subsisting debt, is no discharge of the debt. But in this State it has long been settled, that when a debtor gives to his creditor his negotiable note for a debt due on simple contract, the legal presumption is that the note was received in payment. This presumption arises from the consideration that if the creditor could compel payment of the original debt, the debtor might afterwards be obliged to pay the note to an endorsee, and thus be twice charged." Maneely v. M'Gee, 6 Mass. R. 143. But does the reason given establish the propriety of the peculiar rule adopted in Massachusetts? According to the rule of the common law a debtor is in no danger of being twice charged, since in an action on the original contract, it is held to be necessary for the plaintiff to produce and give up the note, before he can prevail.

The rule of the civil law appears much more reasonable than that of Massachusetts. "Cum hoc quidem inter veteres constabat, tunc fieri novationem, cum novandi animo in secundam obligationem itum fuerat, per hoc autem dubium erat quando novandi animo videtur hoc fieri, et quasdam de hoc præsumptiones alii in aliis casibus introducebant, ideo nostra processit constitutio, quæ apertissime definivit, tunc solum

novationem prioris obligationis fieri, quoties hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt; alioqui et manere pristinam obligationem, et secundam ei accedere, ut maneat ex utraque causa obligatio, secundum nostræ constitutionis definitionem, quam licet ex ipsius lectione apertius cognoscere." Inst. Just. L. III. Tit. 30, s. 3.

It has been held in Massachusetts, that where the underwriter in a policy of insurance, acknowledges the premium paid, and the assured has afterwards a right to the return of the premium, he may recover the same in an action for money had and received; although he gave his promissory note therefor, which remains unpaid in the hands of the underwriter. Hemmenway v. Bradford, 14 Mass. R. 121. See also Russell v. Degrand, 15 Mass. R. 35.

A purchaser of goods, who had paid for them, part in cash and part in his negotiable note, discovered that he had overpaid, but suffered the vendor to obtain judgment against him on the note, without objecting any want of consideration. It was held that he might still maintain an action against the vendor to recover the amount overpaid; for the note being payment, a cause of action accrued immediately to the purchaser, which he did not lose by suffering judgment to go against him on the note. Whitcomb v. Williams, 4 Pick. 228.

In the case of Varner v. Nobleborough, in Maine, Mellen C. J. says, "The legal presumption arising from the fact of drawing a negotiable order, or making a negotiable note, which are received by the creditor, is, that they were intended to be, and in fact are, an extinguishment of the original cause of action. But this presumption may be controlled or explained by the agreement of the parties, or by proof of circumstances or usages inconsistent with such presumption." 2 Greenleaf, 121. S. P. Dascadillas v. Harris, 8 Greenl. 298.

In Connecticut in an action of book debt, the defendant gave in evidence a receipt by the plaintiff acknowledging the receipt of a bill of exchange, which when paid was to be in full of the plaintiff's account: and it appearing that this bill had been protested, the defendant produced a receipt by the plaintiff acknowledging the receipt of the amount of the bill by a bill on another person; the court refused to admit evidence on behalf of the plaintiff that the latter bill was not paid. Anderson v. Henshaw, 2 Day, 272.

But even in Massachusetts a promissory note not negotiable, does not operate as payment of a pre-existing demand in consideration of which it is given. Greenwood v. Curtis, 4 Mass. R. 93.

And Story J. in the case of Wallace v. Agry, says that even in Massachusetts the taking of a negotiable instrument is "only *primâ facie* evidence of being an absolute payment, but the fact is open to explanation, and is not conclusive where the other circumstances qualify or repel the presumption. 4 Mason, 142.

And a negotiable note is no discharge of a debt for which it is given, where it is the agreement or understanding of the parties that it is not to be considered payment. Maneely v. M'Gee, 6 Mass. R. 143.

Thus where a mortgage is given to secure payment of a note, and the assignee of the mortgage takes a new note from the mortgager in exchange for the old one, it not being intended as payment, the mortgage debt is not thereby paid, but the mortgage remains good as security for the amount due on the new note, as against the mortgager himself, whatever it might be against a subsequent purchaser of the land. Watkins v. Hill, 8 Pick. 522.

Maxwell, in payment for boards purchased by him of Tucker, gave

But the holder will be precluded from recovering for the consideration, if it appear that the bill or note has been, by (67) laches or loss, made to operate as a satisfaction of the debt or demand for which it was given; or if he originally re-

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an order in favor of the latter on a third person, payable on the return of the brig Cataract, owned by Maxwell, from a voyage. The order was accepted, and Tucker gave Maxwell a receipt in full. After the usual time for the voyage had long elapsed, the vessel not returning, Tucker sued Maxwell on the original contract; and it was held that the action was maintainable, unless the defendant could prove that the plaintiff was to take the risk of the voyage. Tucker v. Maxwell, 11 Mass. R. 143.

In Maine, where the law is the same as in Massachusetts, if a joint purchase is made for two persons, and one of them gives a note which he signs in his own name and that of the other purchaser, who has not authorized him to sign a note, the note is no bar to an action for goods sold against both purchasers. Wilkins v. Reed, 6 Greenl. 220.

A bill or note given in a foreign country, is not regarded, in Maine, as an extinguishment of a simple contract debt, contracted there, on account of which it was given, unless it is made so by the laws of that country. Descadillas v. Harris, 8 Greenl. 298.

Thus a bill drawn by a master of a vessel, in Guadaloupe, upon his owners in Maine, and not accepted by them, was held to be no bar to an action against them for money lent to the master on their account. Ibid.

(67) Vide antè, chap. vii. [Marbury v. Canfield, 16 Martin, 539; Whittlesey v. Dean, 2 Aikens, 263.

Where a party to whom a bill had been endorsed neglected to have it protested for non-acceptance, it was held that he could maintain no action on the original contract on account of which the bill was endorsed to him. Duncan v. Course, 1 S. Car. R. 100. See also Brower v. Jones, antè, p. 230; Jones v. Savage, 6 Wend. 658; and Henry v. Donaghy, Addison, 39.

Where a bill or note is given for a pre-existing debt, the party receiving it does not make it operate as satisfaction by neglecting to give notice to the person from whom he received it, where it was agreed that such notice need not be given.

A., who was indebted to B., gave B. an order on C., which by agreement was to be received as payment of the debt provided C. accepted it, but if not accepted was to be returned to A.'s brother-in-law. C. refused to accept it; and two or three months after, B. offered the order to the brother-in-law, who refused to receive it. It was held that the order was not a payment, and that A. was not entitled to notice of its dishonor, the terms of the agreement being a waiver of the right to notice. Geiser v. Kershuer, 3 Gill & Johns. 305.

It seems that where a note is received by an officer of the government as collateral security for the payment of a debt due the State, the debtor cannot avail himself of any neglect of the officer to perform the duties usually incumbent on parties thus receiving notes. Seymour v. Van Slyck, 8 Wend. 403.]

ceived the bill or note (68) as cash, and took upon himself the risk of its being paid; or if it were transferred to him by way of (69) sale; unless, indeed, in the two latter cases it be proved that the person transferring the bill or note (70) knew at

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(68) In Owenson v. Morse, 7 Term Rep. 66. antè, p. 396. n. (65) Ld. Kenyon said, "If the defendant had agreed to take the notes as payment, and to run the risk of their being paid, that would have been considered as payment, whether the notes had or had not been afterwards paid." See also Clark v. Mundal, 1 Salk. 124, and ex parte Hodgkinson, 19 Ves. 295.

(69) Fydell v. Clarke and another, 1 Esp. N. P. C. 447. The plaintiff had been in partnership with his brother R. Fydell; and the latter on his own account, but in the partnership name, drew certain notes to the amount of 8000*l.* which he discounted with Hurlock and Co. bankers. The plaintiff, after his brother's death, voluntarily paid the 8000*l.* to the bankers, supposing that his brother had received the amount of these notes in *money:* he afterwards discovered that they had only given other bills and notes, which they had not endorsed, in lieu of his brother's notes, some of which bills and notes, to the amount of 4300*l.*, proved unproductive; and to recover that sum, the present action was brought against the defendants, who were trustees of the insolvent estate of the bankers, and who had reserved funds to answer the event of the action. Lord Kenyon said, that the bankers, by not endorsing the bills and notes, had refused to pledge their credit to their validity, and that R. Fydell must be taken to have received them on their own credit only; and that therefore the action could not be supported. Nonsuit.

Ex parte Shuttleworth, 3 Ves. 368. Newton gave the bankrupt, before his bankruptcy, cash for a bill, but refused to allow the bankrupt to endorse it, thinking the bill better without his name. He now proved the amount under the commission, and on petition to have the debt expunged, the Chancellor granted the petition, observing that this was a sale of the bill. [See also Wilkings v. M'Kenzie, Cam. & Nor. 448.]

(70) In Fenn v. Harrison, 3 Term Rep. 759, Lord Kenyon said, "It is extremely clear that if the holder of a bill send it to market without endorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he sold it, if he did not know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counter into circulation to impose upon the world, instead of the current coin. In this case, if the defendants had known the bill to be bad, there is no doubt but that they would have been obliged to refund the money."

[Rogers v. Langford, 1 Cromp. & Mees. 637. Where bank notes were exchanged for other money on request and for the accommodation of the party who exchanged them away, and the bank stopped payment on the same day, and the party to whom the bank notes were passed heard of the failure of the bank on the following day, and the next day after gave notice to party from whom he took the notes of the failure of the bank, and requested him to exchange them, but did not tender the notes to him until long afterwards, and the notes were never presented at the bank for payment,—held, that for want of such tender he must sustain the loss.]

the time, that it was of no value (*z*); [or unless the signature of any party to it be forged. (*z*)]

[(*z*) The principles stated above are fully recognised in many American cases.

In an action against two partners for goods sold, it is a good plea in bar, that the note of one partner was given and received by the plaintiff for and in *discharge* of the account for the goods sold. Marshall C. J., in delivering the opinion of the Court, says, "The note of one of the parties or of a third person may, by agreement, be received in payment." Sheehy v. Mandeville, 6 Cranch, 253. See also Van Ness v. Forrest, 8 Cranch, 30; Willie v. Green, 2 N. Hamp. R. 333; Campbell v. Mosby, 4 Munf. 287; and James v. Hackley, 16 Johns. R. 273.

In an action against Camp and Downing, as makers of a note, it appeared that the plaintiff had given the note up to Downing and received his separate note for it, but Downing afterwards took back his own note, and returned the partnership note to the plaintiff, on the plaintiff's telling him, that if he did not do so, he should work for him no longer. Thompson C. J. delivered the opinion of the Court. "The facts in the case necessarily lead to the conclusion that when the individual note of Downing was taken, and the partnership note delivered up, it was intended and agreed to be considered as payment of the note in question, and it operates as a satisfaction of the partnership note." Judgment for the defendant. Arnold v. Camp, 2 Johns. R. 409.

Where the selectmen of a town had given a creditor of the town an order on their town treasurer, payable to the creditor or order, for the amount due him, it was held that an action could not be maintained against the town without proving a presentment of the order to the town treasurer. Varner v. Nobleborough, 2 Greenleaf, 121.

But where A. received from B. a check on a bank merely to hold as evidence of the amount due from B. to A. and not to be presented at the bank, and A. passed it to C. in payment of a debt; and C. after ascertaining the purpose for which the check was drawn, and that B. had stopped payment of it, brought an action against A. without having presented the check for payment, Thompson C. J. said that A. had committed a fraud both on B. and C., and directed a verdict for the plaintiff for the amount of the check and interest. Devoe v. Moffat, Anth. N. P. 161.

In an action by Watts against Willing on a bond in which Willing was surety for Bird, it appeared that Bird had delivered certain bills of exchange to Watts, which it appeared by an endorsement on the bond when paid were to be credited in part payment. The bills were not paid, and Watts had furnished accounts in which he had charged 20 per cent. damages on the bills. He did not offer to return the bills at the trial. The Court said, that the two circumstances of retaining the bills in his own hands, and of charging 20 per cent. damages, showed an election to receive them as payment; and that their amount must be credited in this action. Watts v. Willing, 2 Dall. 100. See also the opinion of Sedgwick J. in Wiseman v. Lyman, 7 Mass. R. 286.

Where a debtor remitted to his creditor a bill of exchange drawn by a third person, which when paid was to discharge the debt, and the bill being dishonored, the creditor, contrary to the request of the debtor, delivered up the bill to the drawer, and took his note for the prin-

cipal, interest, and damages, payable at a future day; it was held that the original debt on account of which the bill had been remitted was discharged. Keppele v. Carr, 4 Dallas, 155.

Johnson, on account of goods sold by him to Harris, received from him a note of other persons endorsed by Harris, which when paid was to be in full. Johnson endorsed this note to Dunlop, who sued Harris upon it, but failed to recover, because the law of Virginia gave him recourse only to the maker or his immediate endorser. Johnston sued Harris on the original contract for goods sold, and obtained judgment in the Circuit Court of the District of Columbia. On Error, Marshall C. J. delivered the opinion of the Court. "The judgment is to be reversed, for error in directing the jury that the action was maintainable on the original contract, after the note received as conditional payment had been endorsed." The Court thought that Harris was enti led to have the note returned that he might have his remedy against the previous parties to it; and also because they thought that Dunlop, the holder, might maintain a suit against him in equity, though not at law. Harris v. Johnston, 3 Cranch, 311.

Where a note was given on account of money paid, which was void on account of its also including a sum in consideration of forbearance, it was held that an action might be maintained on the original contract for the payment of money. Johnson v. Johnson, 11 Mass. R. 359.

Roberts bought goods on account of the Providence Hat Manufacturing Company of the plaintiffs, and gave a note for the amount signed, "for the Provid. Hat Man. Co. Frink Roberts." Roberts had no authority to sign such a note, though he had authority to buy goods. It was held that taking the note did not extinguish the implied promise to pay for the goods; and that the company were liable in an action for goods sold and delivered. Emerson v. Providence Hat Man. Co. 12 Mass. R. 237.

Willson sold Foree a horse and chaise, and agreed to take in part payment the note of Whaley at Willson's own risk. In an action by Willson on the original contract of sale, it was held, that he might be allowed to prove, that the defendant at the time of the sale, knowing Whaley to be insolvent, represented to the plaintiff that he was a man of property; and that the plaintiff offered to return the note before bringing the action. The Court said, "The taking of the note under a fraudulent misrepresentation was no payment, and any term of payment which the note may have implied, became void." Willson v. Foree, 6 Johns. R. 110.

Snyder v. Findly, 1 Coxe, 48, is a similar case, and decided on the same ground.

In an action for cattle sold, where the defendant had paid the plaintiff for them in bank notes, one of which turned out to be forged, but it did not appear that either party knew it to be so at the time of the sale, it was held that the plaintiff might recover the amount of the counterfeit note with interest. Kent C. J. delivered the opinion of the Court. "The negotiable note of a third person, and a bank note, are equally promissory notes, for the payment of money; and if the receiver may be presumed in the one case, and not in the other, to have taken upon himself the risk of the solvency of the maker, there is no presumption in either case, that he assumes upon himself the risk of forgery. Markle v. Hatfield, 2 Johns. R. 455. See also the cases, antè, p. 148, n. (86).

So the receipt of a note in satisfaction of a debt, is no payment, if it turn out to be forged. Eagle Bank of New Haven v. Smith, 5 Conn. R. 71.

[If a note be given up, and a new one taken in its place, all

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Where one of two copartners obtained money on a note payable at a future day, and on which he had forged the name of an endorser, the other partner being ignorant of the forgery, it was held that the lender might bring an action for money had and received before the maturity of the note, against both partners, the money having gone to their use. Manufacturers and Mechanics Bank v. Gore, 15 Mass. R. 75.

In another case of the same kind, against partners, as makers of a note, and also on the money counts, where the name of an endorser had been forged on the note by one partner, of which the other was ignorant; it was held that both partners were liable on the money counts, though there was no evidence that the money obtained went to the use of the partnership. It was objected in this case that no civil action could arise out of a felony. Parker C. J. giving the opinion of the Court, said, "As far forth as the objection goes against the recovery by the plaintiff as endorsee of the note it is well founded. For to maintain the action in that shape, he must prove the handwriting of the supposed endorser. But we see no objection to his recovering upon the money counts. He does not claim the money through or under a forgery; but merely on the ground that money was advanced by him on the faith of a security, which turns out to be wholly worthless."— "General copartners are bound by the acts of each other, when the name of the firm or house is pledged to any extent: unless the person who takes a security of that sort, has knowledge of some limitation of the authority of the partner who undertakes to bind the firm. The note was still the note of the partnership, notwithstanding the forgery of the endorser's name. And the money being obtained upon a note payable by the company, both partners must be considered answerable." Boardman v. Gore, 15 Mass. R. 331.

Taking a note from a debtor, and afterwards giving it up to him in consequence of his fraudulent representations, does not extinguish the original debt.

Crane gave Arnold his notes for money lent him by Arnold. Crane afterwards executed a deed of land to Arnold for this debt; and Arnold gave Crane the deed to get it recorded, which Crane offered to have done; and Arnold gave up the notes to Crane. But Crane did not get the deed recorded, and sold the land to another person, who had his deed recorded. Crane refused to pay the money or return the deed or the notes. It was held that Crane having obtained possession of the notes by a fraud, there was no payment or extinguishment of the original debt; and that Arnold might recover against him on the common money counts. Arnold v. Crane, 8 Johns. R. 62.

Hollingworth, as agent of Manly, sold goods to Lewis, for which he took Lewis's note. Lewis fraudulently representing himself insolvent, Hollingworth returned his note to him, on the delivery of goods charged at exorbitant prices. The Court had no doubt that the note was no extinguishment of the original cause of action. Lewis v. Manly, 2 Yeates, 200.

Where a bill was remitted by a debtor to his creditor, the debtor endorsing it, and the bill was dishonored, but the proper steps for charging the parties to it were not taken; it was held, that the bill operated as a payment of the debt to its amount, on account of the laches of the creditor. Denniston v. Imbrie, 3 Wash. C. C. R. 396.]

parties to the first note are discharged, unless their names are on the new note. (*a*)]

A bill or note will satisfy a preceding debt, if the holder make it his own by laches (71): (*l*)

As by not presenting it for payment when due (72);

Though it were taken from a third person (72);

And in such case plaintiff must prove the bill was duly presented (72);

But he need not prove notice to such third person of the bill's dishonor. (72)

[(*a*) Morgan & al. v. Their Creditors, 1 Miller, 527.]

(71) Bridges v. Berry, 3 Taunt. 130. Defendant accepted a bill for 119*l.* due 20th October, but did not pay it: plaintiff was the holder;—defendant afterwards lodged in plaintiff's hands as a security, a bill drawn by defendant upon one Ivory, for 117*l.* 11*s.* 2*d.*, and paid plaintiff the difference: this bill was dishonored, but no notice thereof was given to defendant: action by plaintiff on both bills. It was admitted at the trial that defendant was discharged from the second bill, but it was urged that he continued liable on the first: but Mansfield C. J. and the Court held he did not, and nonsuit; and rule to set it aside refused.

See Swynyard v. Bowes, antè, p. 288. note (133).

(72) Bishop v. Rowe, 3 M. and S. 362. Plaintiff sued the drawer and acceptor of a bill, and proved the necessary facts: defendant gave in evidence, that after the bill was due and part paid, one Tucker, who had been connected with the bill, but had not endorsed it, drew for the balance on Lewis at two months, and gave plaintiff the draft: plaintiff could not prove that the draft was presented for payment, but he nevertheless had a verdict: the Court, however, thought that proof essential, and granted a new trial. On the second trial, plaintiff gave this proof, but he could not prove that he had given notice to Tucker of the dishonor: the point was saved, whether he was bound to give this proof; and on rule nisi for nonsuit, and cause shown, the Court held it sufficient for him to prove presentment and non-payment, for that showed there had been no payment in fact; and if the defendant insisted there had been such neglect as amounted to payment in law, he should have shown it. The rule was discharged.

[Goodwin v. Coates, 1 Moore & Rob. 221. Where the purchaser of goods handed over in payment the note of a third person, payable to himself or order, without endorsing it, held in an action for the price of the goods that the vendor was not bound to demand payment of the note.

If he had endorsed it would have been otherwise. Bridges v. Berry, 3 Taunt. 130.

Where A. received from his debtor B. the note of C., made payable to A., to be in discharge of A.'s claim against B. if paid at maturity, it was held that A. was not bound to give B. notice of the non-payment of the note, as he was not endorser, and that he was not bound to take any trouble or risk in recovering the money of C. Ormsby v. Fortune, 16 S. & R. 302.]

[Where a bill or note is given payable at a future day, no action can be brought on account of the debt for which it was given, until the bill or note is dishonored. (*b*)

A forged check on a bank, which is received by the bank from a *bonâ fide* holder, and either paid or passed to his credit, is equivalent to the payment of so much money to the bank, and the bank cannot in the one case recover back the amount of the check, or in the other retain it. (*c*)

A bill given in part discharge of another, but made null by an alteration of the date by the acceptor while it is in the drawer's hands, is not payment of another former bill accepted by the same acceptor. (*d*)]

If the holder of a bill or note employ a particular agent to get it discounted, but refuse to endorse it, and the agent guaranty its payment, the principal will (73) not be bound by

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[(*b*) Kendrick v. Lomax, 2 Cromp. & Jerv. 405.]

[(*c*) Levy sent a check to the U. S. Bank purporting to be drawn by Wharton upon that bank, between eleven and one o'clock. The bank received the check, credited it to Levy as cash, and charged it to Wharton. The check was a forgery, but Levy was a *bonâ fide* holder. Between three and four the same afternoon, the bank discovered the forgery, and sent notice to Levy. Levy, on first being informed of the forgery, said, "If the check is a forgery, it is no deposit." The bank refusing to pay Levy the amount of the check, he brought a suit against it to recover that sum. Shippen C. J. charged the jury, "When the check was credited to the plaintiff as cash, it was the same thing as if it had been paid. In the latter case the bank would have appeared as plaintiffs; and every mistake which could have been corrected in an action by them, may be corrected in this action, and none other. Now the law seems to be well settled that where a bill of exchange to which the drawer's name is forged has been paid by the drawee, it is too late for him to question the handwriting. The effect of the *acceptance* of a forged bill is not quite so clear. Some of the authorities decide that the acceptor is bound because his acceptance gives a credit to the bill. But the modern cases notice another reason for this liability which we think has much good sense in it, namely, that the acceptor is presumed to know the drawer's handwriting, and by his acceptance to *take this knowledge upon himself.*" As to what Levy said, "it was the expression of an opinion of what he should be obliged to do, rather than what he was willing to allow, and being under a mistake of his right he is not bound by it." Levy v. Bank of the United States, 1 Bin. 27; S. C. 4 Dall. 234.]

[(*d*) Sloman v. Cox, 1 Cromp. Mee. & R. 471.]

(73) Fenn v. Harrison, 3 Term Rep. 757. and 4 Term Rep. 177. The defendants employed F. Huet to get a bill discounted, but said that they would not endorse it; F. H. employed his brother James H. and said he would indemnify him if he would endorse it; James en-

such guaranty; and not being bound, a subsequent promise by him to pay the amount of the bill or note, will be (73) nudum pactum.

But, if no restraint be imposed on such agent, the principal (73) may be bound by his guaranty; at least, such guaranty will be a (73) sufficient consideration to support a subsequent promise by the principal to pay the bill or note.

[A mere endorser of a note is not liable as guarantor. (*e*)

But it seems that if the payee of a note not negotiable endorse it, he is liable as a guarantor, and that an absolute guaranty may be written over his endorsement. (*f*)

A guaranty of a note, like any other promise without consideration, is void. (*g*)

A guaranty of a bill or note, though written on the back of the instrument, is not a negotiable contract, and can only be sued upon in the name of the person to whom it is originally made. (*h*)

Even where the guaranty is in general terms, naming no person to whom it is made, another person becoming the

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dorsed it, and the plaintiffs discounted it: the bill being dishonored, the plaintiffs applied to the defendants, who promised to take it up, but did not; and this action, for money had and received and money paid, was brought against them. Lord Kenyon told the jury, that if they thought that James H. had made himself answerable as agent for the defendants, that was a sufficient consideration for their promise. A verdict was found for the plaintiffs: and on a rule nisi for a new trial, and cause shown, Lord Kenyon inclined to think the verdict right; because, though the agent had exceeded his authority, he thought the principal bound by what he did: the other judges differed, because F. H. was a *particular* agent only: and the rule was made absolute. On the next trial it did not appear that the defendants had told F. H. that they would not endorse the bill. A verdict was found for the plaintiff, and on a rule nisi for a new trial, and cause shown, the whole Court thought the verdict right; because, as F. H. was not restrained as to the mode of getting the bill discounted, the defendants were bound by his act. But Buller and Grose Js. said, that if the facts had been the same, they should have continued of their former opinion. Rule discharged.

[(*e*) Copp v. M'Dugall, 9 Mass. R. 1. See also Hopkins v. Liswell, 12 Mass. R. 52; Josselyn v. Ames, antè, p. 101.]

[(*f*) Seymour v. Van Slyck, 8 Wend. 403.]

[(*g*) Aldridge v. Turner, 1 Gill & Johns. 427.]

[(*h*) See Tyler v. Binney, and Upham v. Prince, antè, p. 109, 110; Lamourieux v. Hewit, 5 Wend. 307.]

holder of the note cannot fill it up so as to make it payable to himself. (*i*)

Where a note is signed by one person as principal and another as surety, and a third person in writing on the back guaranties its payment, if the surety pay the note he has no claim on the guarantor for contribution. (*k*)

Nor will the guarantor be liable to contribution, even where the note has been given in payment of a preceding note, in which the same person signed as principal, and the guarantor and the surety on the new note, as sureties. (*l*)

Where A. and B., being partners, a note given by A. in the copartnership name for his individual debt, was delivered by the payee to B., to give him an opportunity to secure it by an attachment in the name of the payee, upon B.'s guarantying the payment of the note in writing; it was held that there was a sufficient consideration for the guaranty, and as B., at the time of signing the guaranty, knew what the consideration of the note was, he could not avoid the guaranty on the ground that he erroneously supposed himself liable on the note. (*m*)

It seems that withdrawing a note from a bank where it has been lodged for collection, is of itself a sufficient consideration for the promise of a third person not a party, to the holder, to pay the note, although a regular demand is afterwards made on the maker, and sufficient notice given to an endorser. (*n*)]

In case of a transfer by delivery, no action can be brought against the deliverer, except on account of the consideration.

And upon a mere discount of a bill, if A., to whom the

[(*i*) Lamourieux v. Hewit, 5 Wend. 307. This was an action on the following guaranty signed by the defendant, and endorsed on a note: "I hereby guaranty the ultimate payment of the within note." The Court held the guaranty void for want of consideration. The report of the case does not show under what circumstances the guaranty was made. The Court also held that the objection of want of consideration was well taken under the plea of *non assumpsit*.]

[(*k*) Longley v. Griggs, 10 Pick. 121. The Court in this case considered the surety as in effect a principal in regard to the guarantor, that the guarantor was not a co-surety, and that his liability was not affected by his having been a co-surety on the old note, since the relation of the parties depended on the new note.]

[(*l*) Flagg v. Upham, 10 Pick. 140.]

[(*m*) Stewart v. Eden, 2 Cain. R. 150.]

money is advanced and by whom the bill is transferred, be not liable thereon, either as drawer, acceptor, or endorser, and the bill be afterwards dishonored, B., the transferee by whom the money was advanced, is without remedy as against A.; the presumption being, that the bill in the state in which it was transferred, i. e. without A.'s security, was the whole consideration for the money advanced, or in other words that the transaction was a sale of the bill. (74)

But this presumption may be rebutted by evidence of an intention to the contrary. (75)

[In an action against a party to a bill or note, the plaintiff cannot recover without producing it at the trial. (*n*)]

If a bill or note be destroyed by fire or other accident, an action may perhaps be brought thereon as if it were in esse. (76)

[And it has been held, where all the bills of a set miscarried, that an action lay for the original consideration given for them. (*o*)]

But, if a bill or note be lost, there can be no remedy upon it at law, unless it was in such a state, when lost, that no person but plaintiff could have acquired a right to sue thereon. (77)

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(74) Lord Raym. 442. 15 East, 12. 13. 10 Ves. 206. Fydell v. Clarke, and ex parte Shuttleworth, supra, ns. (69) (70).

(75) "There is a great difference between transferring a bill without putting your name to it, and endorsing it; in the one case it is a sale, and in the other a discount; subject, however, to the question of intention, whether the transfer was meant to take effect as a sale or as a discount?" Per Lord Eldon, in ex parte Isbester, 1 Rose, 23. post.

[(*n*) Morgan v. Reintzel, 7 Cranch, 275.]

(76) See Pierson v. Hutchinson, infra. Mayor v. Johnson, post, p. 418, but see Hansard v. Robinson, post, p. 417.

[An action on a lost bill was maintained in South Carolina, the letter-bag of the vessel in which it was sent having been thrown overboard. Anderson v. Robson, 2 Bay, 495.

So in Connecticut an action lies on a note which has been destroyed. Swift v. Stevens, 8 Conn. R. 431.]

[(*o*) All the bills of a set miscarried on their passage to Europe, and of course before acceptance. The manner of the loss is not stated in the case. The owners of the bill applied to the drawers for another bill of the same tenor and date, offering to indemnify against the former bills. The drawers refused to give it. It was held that an action for money had and received lay in favor of the purchasers of the bill against the drawers. Murray v. Carrett, 3 Call. 373.]

(77) Pierson v. Hutchinson, 2 Campb. N. P. C. 211. In an action

As, if it were specially endorsed to plaintiff, and had no endorsement from him upon it. (78)

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by an endorsee against the acceptor of a bill, it appeared that the bill had been lost after endorsement, and the plaintiff had offered the defendant an indemnity. But Lord Ellenborough nonsuited the plaintiff, saying, that if the bill had been proved to have been destroyed, he should have had no difficulty in receiving evidence of its contents, and in directing the jury to find for the plaintiff; but that having been lost, after endorsement by the payee, it might still be in the hands of a bonâ fide endorsee for value, who might sue the defendant upon it. And as to the indemnity, he said a court of law could not inquire into its sufficiency. S. P. ruled by Lord Eldon. See ex parte Greenway, 6 Ves. 812.

[But in an action at law on a lost bill in Pennsylvania, the Court appear to have directed the plaintiffs to indemnify the defendant. Meeker v. Jackson, 3 Yeates, 442.

In an action against the maker of a note, which was lost *after* it became *due*, the plaintiff was nonsuited, on the ground that it was not sufficient to prove its loss without proving its destruction. Curia per Woodworth J. "Although the note was due when it was lost, yet in an action by a *bonâ fide* holder against the maker, he would be exposed to the hazard of showing that fact by evidence. It would therefore be a hard doctrine which should place the maker in this situation, without requiring an indemnity. In such cases, it is better to leave the party to his remedy in equity, where a suitable indemnity will be provided against any subsequent recovery." Judgment affirmed. Rowley v. Ball, 3 Cowen, 303.

The case of Rowley v. Ball is supported by Kirby v. Sisson, 2 Wend. 550, in which the Court consider the law as settled that an action cannot be maintained at law on a note payable to bearer which is lost, but that the only remedy is in Chancery. In this case the Court on a motion to set aside a nonsuit, allowed the defendant to object the *loss* of the note declared on, being a note payable to bearer, as an answer to the motion; although at *nisi prius* no such objection was taken, the defence then urged being on another ground.

In Louisiana, where a note was lost after it was due, the holder was permitted to recover upon it, without giving security. Brent v. Ervin, 15 Martin, 303.

In a suit in Louisiana on a bill or note lost before it is due, the plaintiff is allowed to recover on giving security. Lewis v. Peytarin, 16 Martin, 4; Miller v. Webb, 8 La. R. 516.

It appears from the last case that the plaintiff tendered security according to law before bringing suit; but it does not appear whether such previous tender was necessary to the maintaining of the action.

In Louisiana, parol evidence is admissible to prove that the loss of a bill sued on was duly advertised, without producing the advertisement or the newspaper in which it was published. Miller v. Webb, 8 La. R. 516.]

(78) Long and another v. Bailie, 2 Campb. N. P. C. 214. This was an action against the acceptor of a bill of exchange, payable to the order of the drawer, and by him specially endorsed to the plaintiffs. It was proved that a person took the bill to have it compared with the affidavit to hold to bail, that a copy was then taken, and that the bill

Where it is so specially endorsed, [or is not negotiable,] an action may, perhaps, be brought thereon. (78)

[In the United States it is well settled that an action may be maintained in such case. (*p*)

In an action on a lost note, where the evidence does not prove affirmatively that it is negotiable, the presumption in New York is held to be that it is not negotiable, and the plaintiff is therefore entitled in such case to recover. (*q*)]

If a man take a bill or note for an antecedent debt, and lose it before it is due, with a blank endorsement thereon, he cannot sue upon the bill or note ; (79)

Nor for the antecedent debt ; (79)

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was afterwards stolen from such person. The correctness of this copy and the special endorsement were proved, and upon this the plaintiffs had a verdict.

[(*p*) Where an action was brought on a promissory note as a lost note, and it did not appear that the note was negotiable, or if negotiable, that it had ever been endorsed, and the existence and contents of the note were fully proved, and the circumstances showed that it had been lost or destroyed, it was held that the action was maintainable. Pintard v. Tackington, 10 Johns. R. 104.

In an action against the endorser of a note, where the note was lost, but had been produced a few days before in the trial of an action against the maker, it was held that secondary evidence of the contents of the note might be admitted. The case does not state whether the endorsement was full or in blank. Renner v. Bank of Columbia, 9 Wheat. 581]

[(*q*) M'Nair v. Gilbert, 3 Wend. 344.]

(79) Champion v. Terry, 3 Brod. & Bingh. 295. Plaintiff sued defendant as endorser of a bill, and for goods sold: the bill was drawn by A., accepted by B., and defendant endorsed it in blank to plaintiff for a debt defendant owed plaintiff for goods sold : plaintiff sent the bill, before it became due, by the post, but it never reached its destination : after the time when it became due, plaintiff sued defendant upon his endorsement and for goods sold ; it did not appear that any inquiry had been made after the bill, or that the loss had been advertised : the jury found for defendant. A rule nisi was obtained for a new trial, on the ground that the bill was not taken absolutely in payment of the debt, but conditionally only, provided it should be satisfied ; that plaintiff might still, therefore, sue for the prior debt, and that the non-arrival of the bill was evidence of its loss : but on cause shown against the rule, the Court thought there was not sufficient proof of the loss ; and if there were, as the plaintiff by losing the bill had deprived the defendant of his remedies over upon it against the drawer and acceptor, it would be unjust to allow him to sue the defendant for the prior debt ; and they discharged the rule. They referred to Davis v. Dodd, and Dangerfield v. Wilby, antè, p. 396, and observed that in Long v. Bailie, antè, p. 414, the bill was specially endorsed.

[See also Woodford v. Whitely, M. & M. 517.]

Unless he can show that the bill has been actually destroyed, so that no claim can ever be made thereon against the person he sues. (79)

Nor even then, if such person could have sued upon the bill on taking it up. (79)

But, if the bill or note were unendorsed, and no valid claim can be made thereon for want of such endorsement, the loser is not precluded from suing for the antecedent debt (80);

Or upon the bill or note;

Unless the defendant would have had a remedy over upon the bill or note upon paying it.

Where the person paying is entitled to require an indemnity, the only remedy on a lost bill is in equity; a court of equity can inquire into the sufficiency of an indemnity; a court of law cannot. (81)

The acceptor is not liable to be sued upon a *lost* bill, if the loss were before the bill was due, though he promised to pay it after knowing of the loss: unless there were some new consideration for such promise. (82)

The holder's only remedy is to enforce the giving a new bill under 9 & 10 W. 3. c. 17. s. 3. (82)

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(80) Rolt, assignee of Welsford, v. Watson, 4 Bingh. 273. In an action, after Hilary Term 1827, for goods sold, the defence was, that defendant had accepted a bill for the amount drawn by Welsford and payable to Welsford's order, and due January 1826; and that that acceptance had never come in, so that defendant might still be called upon to pay it. Plaintiff proved that Welsford lost the bill without ever having endorsed it: and on rule nisi to enter nonsuit and cause shown, the court held that as Welsford had lost the bill without ever having endorsed it, defendant could never be called upon to pay that acceptance, and if not, the possible existence of that acceptance was no reason why he should not pay for the goods. Rule discharged.

(81) R. Hansard v. Robinson, post, p. 417, so Pierson v. Hutchinson, antè, p. 413. [See also Rowley v. Ball, antè p. 414.]

(82) Davis v. Dodd, 4 Taunt. 602. Action on bill payable to Allen or order, accepted by defendant, and endorsed generally to plaintiff: plaintiff lost it before it was due, but defendant, after knowing of the loss, promised repeatedly to pay it. Lord Ellenborough, however, held the action not maintainable, and nonsuit; and on motion for a new trial the court agreed with him: they thought defendant under no moral obligation to pay plaintiff, who by his negligence had exposed defendant to the danger of being compelled to pay another holder, and that his subsequent promise, there being no new consideration, was nudum pactum: they said, enforcing the giving a new bill under the statute, seemed to be plaintiff's only course. See the statute, antè, p. 112.

If a bill be lost after action brought thereon, and defendant suffer judgment by default, the court will, on a copy verified by affidavit, refer it to the master to see what is due thereon ; (83)

Especially where the bill has been shown to defendant, and he has admitted his signature, and promised payment. (83)

But, if the bill be lost after action brought, and defendant resist the action, and put the plaintiff to prove the bill, the loss will be no excuse for the non-production of the bill, and plaintiff will not be able to recover. (84)

And it will make no difference though the bill were of so old a date that the statute of limitations has attached upon it.

Nor will it make a difference though the defendant admitted the acceptance, and his liability before the bill was lost. (85)

Losing a bill implies negligence in the loser, and the inevitable results of negligence ought to fall upon him. (85)

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(83) Brown v. Messiter, 3 M. & S. 281. The acceptor of a bill desired to see the bill, and then he admitted the acceptance, and promised payment: he suffered judgment by default; and the bill having been stolen from plaintiff's attorney's pocket, rule nisi to refer on production of copy verified by plaintiff's attorney; and no cause being shown, rule absolute.

(84) Poole v. Smith, Holt. 144. In action by endorsee against acceptor, it appeared that a few days before the trial the bill was picked out of the pocket of plaintiff's attorney's clerk; and that defendant had admitted the acceptance, but said it had been satisfied between him and the drawer: the bill had been due above six years. Gibbs C. J. thought the non-production of the bill called upon him to non-suit plaintiff, and that the statute of limitations made no difference: he said the rule was salutary, and ought not to be relaxed.

[In an action brought in 1815 upon a note, which had been lost in 1797, it was objected that the note might still be in existence, and be again demanded of the defendants by a *bonâ fide* holder. But the court thought that after so great a lapse of time, it was incumbent on the defendants to show either that the note existed, or that it had been demanded of them; and that it must be presumed that no demand would now be made. Peabody v. Denton, 2 Gallis. 351.]

(85) Hansard v. Robinson, 7 Barn. & Cr. 90. Defendant accepted a bill due November 1823, but it was not presented for payment till May 1824: defendant then offered to give another bill in payment, but before such bill was given, plaintiff's clerk lost the original bill: plaintiff informed defendant of the loss, and offered him an indemnity, but defendant refused to pay unless the bill were produced and delivered up to him. Littledale J. thought defendant warranted at law in that refusal, and he non-suited plaintiff; and on rule nisi to enter verdict for plaintiff, and cause shown, and time to consider, the court agreed

[Where a bill had been produced before the commissioners on a bankrupt estate by the petitioning creditor, at the opening of the commission, and was afterwards lost, it was held that proof of the contents of the bill proved the petitioning creditor's debt so as to support the commission. (*r*)

In an action against the maker of a note, in the possession of the defendant, the plaintiff may recover by proving his title to the note, and that the defendant fraudulently retains possession of it, it having been given up to him by the plaintiff under an erroneous impression. (*s*)

So if a note be given up by mistake, supposing it paid, an action may be maintained upon it as lost. (*t*)

In an action on a bill, where the first of the set had been protested for non-payment, the plaintiff, after proving the loss of the protested bill, was allowed to give in evidence the third of the set, and a duplicate protest of the first of the set. (*u*)]

If a bill or note transferable by delivery be cut in halves, and half be lost, the holder cannot sue at law upon the other half. Payment at law cannot be enforced unless the entire instrument be produced, or unless there be proof that the entire instrument, or whatever part of it is wanting, has been destroyed. (86)

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with him: the acceptor, when he pays, has a right to the bill for his own security, and as a voucher against the drawer: if it be destroyed, he is still deprived of it as a voucher; and if it be lost only, some other person may make a claim upon him: and why is he, by the negligence of the loser, to be forced at his peril to prove what may be necessary to resist the claim? and how is he to be assured that the bill has been either lost or destroyed? The proper course is to offer an indemnity, and if that be refused, to apply for relief in a court of equity: a court of equity will enforce payment.

N. Glover v. Thomson, 1 Ryan & M. 403, which is contrary, was cited.

[(*r*) Pooley v. Millard, 1 C. & J. 411; S. C. 1 Tyrw. 331.]

[(*s*) Garlock v. Geortner, 7 Wend. 199.]

[(*t*) Eagle Bank of New Haven v. Smith, 5 Conn. R. 71.]

[(*u*) Usher v. Gaither, 2 Har. & M'H. 457.]

(86) Mayor v. Johnson, 3 Camp. 324. Plaintiff's traveller took a 5*l.* country bank-note, payable at Stamford or London, and cut it in halves, and sent the two halves to plaintiff; one half only arrived, the mail-bag containing the other was stolen: plaintiff sued on the half which arrived; but as plaintiff could not show that the other half was destroyed, Lord Ellenborough held the action could not be supported, and nonsuit.

[It is held that secondary evidence of the contents of a lost note is admissible, without a special count upon a lost note. (*v*)]

A special count upon a bill or note states in their order all the facts necessary to maintain the action.

To give a full idea of this count, and open the way to the observations necessary to be made upon it, I shall insert a comprehensive one in assumpsit upon a foreign bill, which will sufficiently elucidate those on inland bills or notes, and those in debt.

Count in assumpsit upon a Foreign Bill.

London, } John Mills v. Thomas Roper and Stephen Howe.
to wit. } For that whereas on (1) the 1st day of January, 1789, at (2) London aforesaid, in the parish of St. Mary le Bow, in the ward of Cheap, certain persons (2[a]) using the

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N. He assigned as a reason, that the stolen half might immediately have got into the hands of a bonâ fide holder for value, and that such holder would have had as good a right as plaintiff: but, quære—whether a man who takes half a note does not take it at his peril?

[A different decision has been made by Washington J. in Bullet v. Bank of Pennsylvania, 2 Wash. C. C. R. 172. The plaintiffs having occasion to remit money to Baltimore, cut several notes of the Bank of Pennsylvania, the defendant, in halves, and sent one half of each of the notes by mail to their correspondent at that place, which were duly received. The remaining halves were afterwards sent by mail, but were never received, and had never since been heard of. An action being brought against the bank, it was held that the plaintiffs who produced the halves of each of the notes were entitled to recover the full amount of them. Washington J. said, "When the half of a bank note is presented for payment, the payer may, very properly, require the holder to account for the mutilated state of the note, and to prove that he came fairly to the possession of it. If the latter has it in his power to satisfy the former that he was the fair, *bonâ fide* holder of the entire note, and that during such his possession, he divided it into two parts, the production of one of the parts would establish his right to the full amount of the note; because, in such case, it could not happen that any third person could fairly acquire the possession of the other half part; for if he took it in a course of trade, and for a valuable consideration, still he would take it with notice, that the right to the money might be in the possession of the other half; and would consequently be bound by every defence which could legally be made against the finder or robber." S. P. Patton v. State Bank, 2 Nott & M'Cord, 464; Armat v. Union Bank of Georgetown, in the Circuit Court of the United States for the District of Columbia, 2 Nott & M'Cord, 471, note; Hinsdale v. Bank of Orange, 6 Wend. 378.]

[(*v*) Renner v. Bank of Columbia, 9 Wheat. R. 581.]

style and firm of Gaunt and Co. according (3) to the usage and custom of merchants, from time immemorial used and approved of, made (4) their certain bill of exchange in writing, their (5) copartnership style and firm aforesaid, being thereunto subscribed, bearing (6) date the day and year aforesaid, and (7) directed to one Henry Hunt, at Venice, in Italy, in parts beyond the seas, and (8) thereby requested the said Henry, at double usance, (8*) to pay in Venice (8*) that their first of exchange (second (9) and third of the same tenor not paid) to the said (9*) Thomas and Stephen, or (10) their order, a certain sum of foreign money (10*), called in the said bill seven hundred ducats, value (10*) received, and then and there (10*) delivered the said bill to the said Thomas and Stephen, which (11) said bill the said Henry Hunt, afterwards, to wit, on (12) the day and year aforesaid, at Venice, to wit, at London aforesaid, in the parish and ward aforesaid, on sight thereof, duly, according to the usage and custom of merchants, accepted, payable at A. B. and Co.'s Venice (12*); and the said Thomas and Stephen (12*) afterwards and before the payment of the said sum of money in the said bill mentioned, or of any part thereof, to wit, on the day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, by their certain endorsement (12*) in writing then and there made upon the said bill (12*), their proper hands being thereunto subscribed, according to the usage and custom of merchants, appointed the (13) contents of the said bill to be paid to one Peter White, or (14) his order, and then and there delivered the said bill so endorsed to the said Peter; and (15) the said Peter afterwards and before the payment of the said sum of money in the said bill mentioned, or of any part thereof, to wit, on the day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, by his certain endorsement in writing then and there made upon the said bill, his proper hand being thereunto subscribed, appointed the contents of the said bill to be paid to the said John, and then and there delivered the said bill so endorsed to the said John, of (16) which said endorsements the said Henry afterwards, to wit, on the day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, had notice; and the said John in fact says, that (17)

an usance mentioned in any bill of exchange drawn in London and payable in Venice, is and at the several times aforesaid was, three calendar months from the date of the said bill, and no other time whatever; and (18) that afterwards, and when the said bill had according to the tenor and effect thereof become payable, to wit, on (19) the 4th day of July, in the year aforesaid, at Venice aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, the said bill was duly, according to the usage and custom of merchants, and according to the tenor of the said acceptance thereof, shown and presented to the said Henry at A. B. and Co.'s aforesaid, at Venice aforesaid, for payment; and the said Henry was then and there requested to pay the said sum of money in the said bill mentioned; but the said Henry did not then (19[a]) or there pay the said sum of money in the said bill mentioned, or any part thereof, but wholly neglected and refused so to do; neither (20) did he pay the said second or third of exchange in the said bill mentioned, or either of them; nor (21) did the said persons so using the style and firm of Gaunt and Co. pay the said sum of money in the said bill mentioned, or any part thereof, or the said second or third of exchange; and thereupon the said John, afterwards, to wit, on the day and year last aforesaid, at Venice aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, caused the said bill to be protested (22) for non-payment; of all which premises the said Thomas and Stephen afterwards, to wit, on the day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, had (23) notice; and by reason thereof, and by force of the usage and custom of merchants, became liable to pay to (24) the said John the said sum of money in the said bill mentioned, or the value thereof, when (25) they the said Thomas and Stephen should be thereunto afterwards requested: and (26) being so liable, they the said Thomas and Stephen, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and to the said John then and there faithfully promised, to pay to him the said sum of money in the said bill mentioned, or the value thereof, when they the said Thomas and Ste-

phen should be thereunto afterwards requested: and (27) the said John avers, that the said 700 ducats in the said bill mentioned, on the day and year last aforesaid, were, and from thenceforth hitherto have been, and still are of great value, to wit, of the value of *l.* of lawful money of Great Britain, that is to say, at London aforesaid, in the parish and ward aforesaid; yet the said Thomas and Stephen (although often requested) have not nor hath either of them paid to the said John the said sum of money in the said bill mentioned, or any part thereof, or the value thereof, or of any part thereof, but have wholly neglected and refused, and still neglect and refuse so to do; wherefore the said John says he is injured, and hath sustained damage to the value of *l.*, and therefore he brings suit, &c.

1. "On," &c. Upon a bill or note importing to be payable within a limited time after the date, and dated on a particular day, the date here inserted (87) must be that day: on a bill or note importing to be payable within a limited time after the date, and not dated, the day (88) it issued, if it can be ascertained; otherwise, (89) the first day the plaintiff knew and can prove that it existed.

2. "At," &c. On a foreign bill the place here mentioned must be the place at which it bears date; but where the drawing of the bill must be proved upon a trial, some place in England or Wales should be subjoined, under a videlicet, thus, "at Venice in Italy, to wit, at London," &c.

In an action against the drawer, the want of subjoining such place may be taken advantage of by special demurrer to the count; but by special demurrer (90) only.

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(87) Stafford v. Forcer, 10 Mod. 511, cited Str. 22. In an action on a note dated in 1704, defendant pleaded that the cause of action did not accrue within six years; the plaintiff replied a bill filed in 1714, and that the cause of action accrued within six years of that time; and after verdict for the plaintiff the Court arrested the judgment, because it was stated that the note was made and dated in 1704, and then the cause of action must have accrued above six years before 1714.

(88) Vide antè, p. 237, n. (64).

(89) Vide Beawes, s. 190, p. 439.

(90) Vide 16 & 17 Car. 2. c. 8. s. 1, 4 Ann. c. 16. s. 1.

[A note dated at Boston, which is in the County of Suffolk, was declared on as dated at Concord, in the County of Middlesex, in which

In an action on a foreign note, it may be stated to have been made at any place in England, without naming the foreign place. (91)

Inland bills and notes, though they may bear date at a particular place, may be alleged to have been made any where in England or Wales.

2ᵈ. "Certain persons." A bill or note may be stated according to its legal operation.

Thus a joint or several note, or a note importing in the body of it to be made by several persons, but signed by one only (92), may be stated as a several note.

Nay, where the plaintiff, in an action against one of two makers of a joint or several note, stated, that the defendant and another made their certain note, &c. and thereby jointly or severally promised to pay, the Court held it (93) well after

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the action was brought. It having been objected that this was a variance, the Court did not decide the question, but said that the mistake, if it was one, was a mere clerical mistake, and gave the plaintiff liberty to amend without costs. Munroe v. Cooper, 5 Pick. 412.]

(91) Houriet v. Morris, 3 Campb. 303. In an action on a note dated at Paris, the statement was, that defendant at London, &c. made his note, &c.; it was urged that it should have been stated to have been made at Paris, to wit, at London, &c.; but Lord Ellenborough said the contract was transitory, and the statement sufficient.

(92) Roberts v. Peake, Burr. 322. A note signed by the defendant alone, but importing in the body of it to have been made by the defendant and another person, was declared upon as the several note of the defendant, and it was agreed that it might be declared upon according to its legal operation; but judgment was given for the defendant upon another ground. See Siffkin v. Walker, 2 Campb. N. P. C. 308.

(93) Butler v. Malissy, Str. 76. In an action on a note, the declaration stated that the defendant and another did jointly or severally promise to pay; and upon demurrer, the Court held it bad, and the plaintiff obtained leave to discontinue. And in Ovington v. Neale, Str. 819, Lord Raym. 1544, the plaintiff declared upon a note by which the defendant and another jointly or severally promised to pay; and upon error, the Court of King's Bench held it bad, because the plaintiff had not shown a title to bring a separate action against the defendant, for he only says he has this or some other cause of action; and judgment for the plaintiff was reversed. However, in Rees v. Abbott, Cowp. 832, the declaration upon a note stated that the defendant and another made their note, by which they jointly or severally promised to pay; and upon error after judgment by default, Butler v. Malissy, and Ovington v. Neale, were cited as in point. Sed per Lord Mansfield, "If *or* is to be considered in this case as a disjunctive, the plaintiff is to elect, and by the action he has made his election to consider the note as several; but, in this case, it is synonymous to *and*, and both and each promise to pay." Judgment affirmed.

judgment by default; notwithstanding, as the truth of either member verified a disjunctive proposition, the note might have been joint.

And in an (94) action against one of the several makers of a joint note, or one (95) of several drawers of a joint bill, if it be stated as a several one made by one alone, the objection can only be taken by plea in abatement.

A bill or note made by a servant for his master may be stated to have been made by the master, because that (96) is its legal operation.

And if it be stated, that the proper hand of the master was thereunto subscribed, it will be no variance: these words will be rejected as surplusage. (96*)

[But a note signed "A" cannot be declared on as a note executed "for and on behalf of B. by his agent A." and the declaration will be bad on account of the variance. (*w*)

In declaring on a bill or note, in alleging the signature or endorsement of a partnership, where the partners are not parties to the suit, it is not necessary to set forth the names of the persons composing the firm. (*x*)

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(94) Per Puller J., Rees v. Abbott, suprà; and see Rice v. Shute, Burr. 2611., and Abbott v. Smith, Blackst. 947.

(95) Evans v. Lewis, E. 1794. cit. 1 B. & Ald. 226. In an action against defendant as drawer of a bill, the declaration stated that he made his certain bill of exchange, &c.; it appeared in evidence that the bill was drawn by defendant and another person jointly: the point was saved whether this was a variance, and the Court on motion were of opinion it was not, and that the only mode by which the defendant could have made the objection was by plea in abatement.

[A declaration on a note against C. Stump, stated that he made his note, "with the name and hand-writing of said Stump thereto subscribed." It was held, that a note signed C. Stump and Co. in which firm two other persons were partners, might be produced in evidence in support of the declaration. Gratz v. Stump, Cook's R. 494.]

(96) See antè, p. 423.

(96*) Booth v. Grove, 1 Mood. & M. N. P. C. Lord Tenderden C. J.

[(*w*) Rossiter v. Marsh, 4 Conn. R. 196.]

[(*x*) Cochran v. Scott, 3 Wend. 229. A declaration on a note alleged to be payable to Lawrence Power and Company, averred an endorsement by Lawrence Power and Company, without setting forth the names of the persons composing the firm. On demurrer the Court held the declaration sufficient, Power and Co. not being parties to the suit.

Where the plaintiff in his declaration described himself as executor of A. "who was the surviving partner of the late firm of A. and B." and alleged that the defendant made his note by which he promised to pay "A. and B. or order;" it was held that the declaration was sufficient without stating particularly the names of the persons composing the firm of A. and B. (*y*)]

3. "According," &c. It is (97) not requisite to set out any part of the custom, and even a reference to it is (98) unnecessary.

In actions upon notes, instead of referring to the custom of merchants, the count refers to the statute, but this reference is unnecessary.

4. "Made." Where a man signs his name upon a blank paper stamped with a bill stamp, and delivers it to another to draw above the signature what bill he pleases thereon, and he draws one accordingly, the (99) bill may be stated to have been made by the person whose signature it bears.

[A declaration averring "that A. by his agent B. made his promissory note," was held sufficient; and it was held not to be necessary to aver that B. signed it, or that B. was duly authorized, the word "*made*" implying a signing, and the expression made by his agent importing an agent sufficiently authorized. (*z*)

In declaring on a bill or note in a foreign language, it may

[(*y*) Childress v. Emery, 8 Wheat. 642.]

(97) Soper v. Dible, Lord Raym. 175. In an action upon a bill, the defendant demurred, because the declaration did not set out the custom, the Court held it unnecessary, and said the better way was to omit it.

(98) This was determined in Ereskin v. Murray, antè, p. 32, on error after judgment by default; and see Lord Raym. 88, Carth. 83, 269, 270, Lutw. 279.

(99) Collis v. Emett, 1 H. Blackst. 313. Emett signed a piece of blank paper stamped with a bill stamp, and delivered it to Livesay and Co. that they might write above his signature such bill as they should please: they wrote one accordingly; and an action being brought thereon against Emett, in which it was stated that he drew the bill, the Court thought the statement proper; and upon a special verdict stating these facts the Court gave judgment for the plaintiff upon a count which alleged that the bill was drawn by the defendant. So Cruchley v. Clarance, antè, p. 30, and Atwood v. Griffin, antè, p. 31. See also Russell v. Langstaff, antè, p. 145.

[(*z*) Childress v. Emery, 8 Wheat. 642.

be declared on in the same manner as if in English, according to its legal effect. (*a*)

It is not necessary to set forth in a declaration that one of the partners of a firm made or endorsed a note in the name or style of the partnership: it is sufficient to declare upon it according to its legal effect, as made or endorsed by the partners. (*b*)

In an action against three persons as makers of a note, the declaration stated that the defendants "made their certain note in writing." The note produced was signed by one of the defendants with his own name, and by one of the two others with a partnership name, under which it was proved that the two others did business. It was held there was no variance. (*c*)

It is not necessary to state in the declaration that the note declared on is mutilated. (*d*)]

5. "Their," &c. A signature, when essential, is (100) implied by the preceding word "made;" this allegation, therefore, is not strictly necessary, and had better be omitted, although a (101) variance in this particular would be of no importance.

[(*a*) Lanbert v. Blackman, 1 Ind. R. 59.]

[(*b*) Manhattan Company v. Ledyard, 1 Cain R. 192.]

[(*c*) Vallett v. Parker, 6 Wend. 615. See also Mack v. Spencer, 4 Wend. 411.]

[(*d*) Duckwall v. Weaver, 2 Hamm. 13.]

(100) This was ruled upon demurrer in Elliot v. Cowper, antè, p. 31, and Smith v. Jarves, antè, p. 32.; and on error after judgment by default, in Ereskin v. Murray, antè, p. 32.

(101) Jones and another v. Mars and another, 2 Campb. N. P. C. 305. The declaration in an action against the drawers of a bill, stated it to have been made by the defendants, "their own proper *hands* being thereunto subscribed." The bill was in fact signed by only one of them, "Mars and Co." Lord Ellenborough doubted whether the variance was material; but refused to nonsuit the plaintiffs. He said had it been "their own proper *hand*," he should have held it clearly sufficient.

Booth v. Grove, 11 Moody & M. 182. Declaration that defendant made a note, "his own proper hand being thereunto subscribed:" it appeared the note was made by defendant's son under his authority: it was objected this was a variance, sed per Lord T., "I think certainly not. These words may be rejected as surplusage."

[A declaration upon a note stating it as made "under the hands" of the defendants, was held to be supported by a note produced in evi-

[A declaration against three persons, as makers of a note, two of whom were described as partners in the commencement of the declaration, charged that the defendants made their note, "their own proper hands being thereunto subscribed." The note produced had the signature of one defendant, and of the partnership firm of the others signed by one of them. It was held that there was no variance. (*e*)]

6. "Bearing," &c. This allegation (102) also may be dispensed with; for it shall be intended, when the date is material, that a bill or note was dated when drawn.

Where the date is immaterial, and this allegation is omitted in the declaration, this intendment shall (103) not operate so as to render a variance between the date of the bill and the day on which it is stated to have been drawn fatal.

7. "Directed," &c. In an action against the acceptor upon a bill directed to him, or, in his absence, to I. S., the (104) conditional direction to I. S. need not be stated.

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dence signed with the defendants' names by an agent. Phelps v. Riley, 3 Conn. R. 266.]

See also Levy v. Wilson, 5 Esp. N. P. C. 180., post, and Helmsley v. Loader, 2 Campb. N. P. C. 450., and Heys v. Heseltine, 2 Campb. 604.

[In an action against John and George Pease, as makers of a note, the declaration did not aver that they were partners, but said that the defendants made the note, "their own proper hands and names being thereunto subscribed." It was held that a note signed by the defendant, George, with the name of the firm, John and George Pease, did not support the declaration. Pease v. Morgan, 7 Johns. R. 468.]

[(*e*) Porter v. Cumings, 7 Wend. 172.]

(102) De la Courtier v. Bellamy, 2 Show. 422. In an action upon a foreign bill payable at double usance from the date thereof, the declaration stated that the drawer on such a day drew the bill, but the date was not set forth. An exception was taken on this ground; but, by the whole Court, "It is well enough; we will intend it was dated when in was drawn:" judgment for the plaintiff. Same point ruled acc., Hague v. French, 3 Bos. & Pull. 173.

(103) Coxon v. Lyon, 2 Campb. N. P. C. 307 n. The declaration stated that the defendant, on the 3d of February, 1810, made his bill, requesting the drawee to pay on a particular day. The bill was in fact dated the 6th of February, 1810, but no date was stated in the declaration. Thompson B. held that the variance was immaterial.

(104) Anon. 12 Mod. 447. A bill directed "to A., or, in his absence, to B.," began thus: "Gentlemen, pray pay," &c. A. accepted it; and in an action against him on his acceptance, the declaration described the bill as directed to A., without any notice of B.; and Holt C. J. held it well.

So, in an action against the acceptor of a bill, though the bill were directed to him and another person, it may be described as directed to him, without naming the other person. (105)

In an action against an acceptor, if the bill were not directed to him, it has been held to be a fatal variance to state that it was. (106)

But if the bill import to be payable at a particular house, and it be accepted by the person who lives there, it may be described as requesting that person to pay (107):

And as directed to him; for that is its legal operation.

If a bill be directed to Messrs. A., B. and C., it is no variance, in setting out the bill according to its tenor, to put *Messʳˢ*. A., B. and Co., without the *r*, instead of Messʳˢ. with it. (108)

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(105) Mountstephen v. Brooks, 1 Barn. & Ald. 224. In an action against three as acceptors of a bill, the declaration stated that J. S. made his bill directed to defendants, and thereby requested them to pay, &c.: it appeared in evidence, that it was in fact directed to them and one Richard Smith, with whom they were in partnership, and that it was accepted by him and them. Lord Ellenborough thought this a variance, and nonsuited the plaintiff; but on an application for a new trial, he changed his opinion; and the rest of the Court concurring with him, a new trial was granted.

(106) Gray v. Milner, 2 Stark. 336. In an action against the acceptor of a bill, the declaration stated that the bill was directed to the defendant: it appeared to have no direction. Lord Ellenborough held this a fatal misdescription, and nonsuited the plaintiff.

(107) Gray v. Milner, 8 Taunt. 739. In an action against defendant as acceptor of a bill, the declaration stated that W. S. made his bill, and thereby requested defendant to pay, and that he accepted it; the instrument imported to be an order to pay, but instead of the usual address to a drawee, had these words, "payable at No. 1 Wilmot Street, opposite the Lamb, Bethnal Green, London." Defendant, who lived there, accepted it. On point saved and time to consider, the Court held that directing it to a particular house must mean to some person who resided there, and defendant, by accepting it, acknowledged that he was the person to whom it was directed; and plaintiff had judgment.

(108) Rex v. Oldfield, Mich. 1815. An indictment for forging an endorsement upon a bill imported to set out the bill according to its tenor; the bill was directed to "Messʳˢ. Masterman and Co.," but upon the indictment the r in Messrs. was omitted, and it stood Messˢ; the point was saved for the consideration of the twelve judges, and they were unanimous that as it appeared by the context that Messˢ must mean Messʳˢ, the variance was immaterial, and the conviction unobjectionable.

[A declaration on a bill stating it as directed to A. C., meaning B. C., and presented to A. C. *alias* B. C., has been held sufficient on demurrer. (*f*)

A declaration on a promise to A. B. by the name of C. D., is sufficient. (*g*)]

8. "In Venice." If a bill or note, in what is strictly part of it, fix a specific place for payment, it is a fatal variance to omit stating it in setting out the bill or note. (109)

Unless the objection be remedied by 1 & 2 Geo. 4. c. 78. (110)

On the other hand, if it be stated as the import of the bill or note that the money should be paid at a specific place, when the provision for that purpose is not strictly part of the bill or note, it is a fatal variance. (111)

[(*f*) Sterry v. Robinson, 1 Day, 11.]

[(*g*) A declaration on a note, averring that the defendants "promised the Medway Cotton Manufactory, (the plaintiffs) by the name of Richardson, Metcalf, and Co." was on demurrer held sufficient. Medway Cotton Manufactory v. Adams, 10 Mass. R. 360.]

(109) Roche v. Campbell, 3 Camph. 247. A note was in this form, "31 days after date I promise to pay J. S. or order, at the house of N., No. 6, Grafton-street, Dublin, 40*l.*" &c. In an action by endorsee against endorser, the bill was described generally to pay J. S. or order, without naming the place: and it was urged that this was a misdescription, for it implied that the note was payable generally, while it was only payable at one given house. Lord Ellenborough thought it a fatal misdescription, and nonsuited plaintiff.

Hodge v. Fillis, 3 Camph. 463. A bill was addressed to Messrs. Fillis and Co., Plymouth, "payable in London;" they accepted it, payable at Sir John Perring and Co.'s, London. In an action against them, the first count, in stating the bill, omitted to allege that the address made it payable in London. Lord Ellenborough thought the omission fatal on that count; but on proof of a promise by defendants to pay after the bill was due, he thought the plaintiff entitled to recover on other counts; and verdict accordingly.

[The declaration on a note stated no place of payment; the note offered in evidence was "negotiable and payable at the Office of Discount and Deposit of the Bank of the United States at Lexington." It was held that the variance was fatal. Sebree v. Dorr, 9 Wheat. R. 558.]

(110) Vide antè, p. 182, 207.

(111) Exon v. Russell, 4 Maule and Selw. 505. At the bottom of a note was written, "at Messrs. Brown and Co.'s, bankers, London:" in stating the note, the declaration alleged that defendant made the note, and thereby promised to pay, &c. and made the same payable, and to be paid according to the tenor and effect, at the house of persons described as Messrs. Brown and Co., bankers, London. On rule nisi for a nonsuit upon another ground, the Court thought it a misdescription

In such case, however, stating that the party made the bill or note, and that he *then and there* made it payable at the specified place, without stating that he *thereby* made it so payable, is not fatal. (112)

[8.* "At double usance." If a note is payable at a certain time after date, and the count upon it either states no time of payment, or states it to be payable on demand, the variance is fatal; (*h*) even upon executing a writ of inquiry. (*i*)

But it is sufficient to declare on a note according to the terms of it. And therefore a declaration which stated no time of payment, was on demurrer held to be good. (*k*)]

9. "Second," &c. In an action upon a bill consisting of several parts, if the plaintiff has each part, it may be doubted whether he need take notice of this condition, because all the parts collectively make an unconditional bill; and where he has not each part, it should seem more correct to state that the drawer made his certain bill of exchange in writing in three parts, and by each of the said parts requested, &c.; but the form I have adopted is the usual one.

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of the note to state as its import that it was made payable at a particular place; for as the place was mentioned by way of memorandum only, and not as part of the contract, that was not its import; and on that ground the rule for a nonsuit was made absolute.

(112) Hardy v. Woodroffe, 2 Stark. 319. In an action against the maker of a note, it was alleged in the declaration that defendant made the note, &c. and that he then and there made it payable at No. 32, Castle-street, Holborn; the defendant had written upon the note "payable at No. 32, Castle-street, Holborn," and Abbott J. held that that memorandum supported the statement in the declaration; and plaintiff had a verdict.

[(*h*) Sebree v. Dorr, 9 Wheat. R. 558; Page v. Bank of Alexandria 7 Wheat. R. 35.]

[(*i*) Sheehy v. Mandeville, 7 Cranch, 208.]

[(*k*) The declaration on a note mentioned no time of payment. Demurrer. Per Curiam. "It is to be presumed that the declaration states the note according to the terms of it, and that is sufficient. The conclusion of law is, that where no time of payment is specified in the note, it is payable immediately. The declaration then shews a cause of action, and the plaintiff is entitled to judgment." Herrick v. Bennett, 8 Johns. R. 291.

But such a declaration has been held in Connecticut, on error, not to be sufficient, on the ground that the declaration should state the contract to be to pay on demand, according to the *legal effect* of the note, no time of payment being specified, and that it was not sufficient to declare according to the terms of the note, which was merely the evidence of the contract. Bacon v. Page, 1 Conn. R. 404.]

9ª. "To the said Thomas and Stephen." A bill or note importing to be payable to a fictitious person, and to be endorsed by him, may be stated to be payable to the person in whose favor the endorsement is made, or, if it import to be endorsed in blank, it may be stated to be payable to (113) bearer.

A bill or note intended to have been made payable to A. that he might guarantee the payment to B., but, through ignorance or mistake, made payable to . and by him endorsed to A., and then endorsed back by A. to B., may, perhaps, (114), be stated to have been made payable to A.

The payee of a bill or note payable "to his order," may (115) state it to have been made payable to himself.

[In a suit by the payee against the maker of a note which is payable to the plaintiff *or order*, if it is declared on as payable to the plaintiff, without saying or to his order, the variance is immaterial. (*l*)]

If the intended payee's name be miswritten, so as to give it a different sound and make it a different name, it may be stated to have been made payable to the person intended, and evidence may be given to show who was intended. (116)

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(113) Vide antè, p. 26. n. (71). In Vere v. Lewis, antè, p. 27, Lord Kenyon, Ashhurst and Buller Js., thought that the plaintiff might recover on the count which stated that the bill was drawn payable to bearer; and in Collis v. Emett, antè, p. 28, n. (72), it was so decided.

(114) Bishop v. Hayward, 4 Term Rep. 470. A note payable to the plaintiff or order was endorsed by him to the defendant, and endorsed back again by the defendant to him; these facts being stated on the declaration, the Court arrested the judgment. It was suggested in the argument that the plaintiff had refused to take the note, unless the defendant put his name upon it, and that as he was made payee, his endorsement was mere form; and per Lord Kenyon, "Had it been understood by all parties that the note, though nominally payable to the plaintiff, was substantially to be paid to the defendant, it should have been declared on according to its legal import, as was held in Minet v. Gibson; a name may be omitted in the declaration, if the legal operation of the instrument requires it." Vide antè, pp. 342, 343.

(115) Frederick v. Cotton, 2 Show. 8. In an action against the acceptor of a bill, it was objected, in arrest of judgment, that the bill was stated to be payable to the order of the plaintiff, and no order was alleged; but the court resolved without any difficulty, that money to be paid to a man's order was due to himself; and judgment was given for the plaintiff. [See also Sherman v. Gobles, 4 Conn. R. 246.]

[(*l*) Fay v. Goulding, 10 Pick. 122.]

(116) Willis v. Barrett, 2 Stark. 29. E. Willis sued as payee of a

10. "Or order," &c. In an action by the assignee of a bill or note, it is necessary to show that the bill or note authorizes a transfer; in an action by the payee (117) it is not.

10². "Money." If a bill or note be for money of the same appellation as ours, but of different value, it must not be stated as if it were for our money (118);

As if it be for so many pounds, and be drawn and payable in Ireland, it must not be stated to be for so many pounds generally, without something to show that pounds Irish were meant. (118)

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note; the note, when produced, imported to be payable to E. Willison, but Lord Ellenborough allowed evidence to prove that plaintiff was the person meant; and he had a verdict. [See also Medway Cotton Manufactory v. Adams, ante, p. 429.]

(117) See ante, p. 29, note (73.)

Moore v. Paine, Ann. 288. In error upon a judgment by default in an action upon a note, it was objected that it was only stated to be payable to the plaintiff, and not *to his order;* but by Lord Hardwicke, "that has been overruled often;" the judgment was affirmed.

[In an action by the endorsee of a note against the maker, the declaration did not state the note to be payable to order. After judgment for want of a plea, and a writ of inquiry executed and returned, judgment was arrested for this defect in the declaration. Barriere v. Nairac, 2 Dall. 249.

The declaration in an action by the assignees of a note against the assignors, did not state the note to be payable to order, the note offered in evidence was payable to the defendants "or their order." The variance was held to be fatal. Sebree v. Dorr, 9 Wheat. R. 558.]

(118) Kearney v. King, 2 B. and Ald. 301. In an action against the acceptor, the declaration stated that A. B. at Dublin, to wit, at London, drew a bill on defendant requiring him to pay the sum of 542*l.* 1*s.* 8*d.* The bill, when produced, appeared to be drawn in Ireland, and to be payable in Ireland, and though it was for 542*l.* 1*s.* 8*d.* sterling, that sum Irish was only equal to 500*l.* 7*s.* 9*d.* English; and on rule nisi for a nonsuit, and cause shown, the court were clear that the bill, as stated, must be taken to have been for English money; and the bill produced being for Irish, there was a clear variance; and the rule was made absolute.

Sprowle v. Legge, 6 B. and Ald. 16. The declaration stated that defendant, at Dublin, to wit, at London, made his promissory note, and thereby promised to pay at No. 81 Dame street, Dublin, 171*l.* 17*s.* 6*d.* sterling: it appeared in evidence that the note was made at Dublin, in Ireland, and that in Ireland, Irish currency is called sterling. Abbott C. J. directed verdict for defendant with liberty to plaintiff to move, motion accordingly; but the court thought that in an English court, if the instrument, which was stated according to its legal effect, were described as containing a promise to pay a sum generally in pounds, shillings, and pence, English money must be understood; and that if the instrument really were for payment in other money, it was a fatal variance. Rule refused.

[Where a bill is payable in dollars and cents, a misdescription as to the cents is fatal. (*m*)]

10[3]. "Value received." It is not necessary to state that a bill or note was for value received.

But, if it be so stated, and the statement give a wrong meaning to those words, it may be a fatal misdescription. (119)

Upon a bill payable to the drawer's order, if the bill be for value received generally, without saying by whom, it is giving them a wrong meaning to state it as for value received by the drawer. (119)

If the bill be payable to a third person, it is not. (120)

[If a bill or note be written "for value received," an omission to set out these words in the declaration is a fatal variance. (*n*)

It is not necessary to aver a consideration in declaring on a bill or note. (*o*)

[(*m*) Pilie v. Mollere, 14 Martin, 666.]

(119) Highmore v. Primrose, 5 Maule and Selw. 55. A bill payable to the drawer's order was for value received generally; the declaration stated that it was for value received by the drawer. The court thought that value received by the drawer could be no foundation for his drawing to his own order, and considered this a variance; but there being an acknowledgment of the debt by the defendant, the plaintiff recovered on the account stated. [See also Treadway v. Nicks, 3 M'Cord, 195.]

(120) Grant v. Da Costa, 3 M. & Selw. 351. In an action against the acceptor on a bill payable to J S. or order, it was stated to be for value received by the drawer; on production, it appeared to be for value received generally: and on a rule nisi for a nonsuit, on the ground "that the value received" must mean "received of the drawee," the Court held that the meaning of value received on such a bill, payable to a third person, was, that the value had been received by the drawer from the payee; that it was natural the drawer should give the drawee that information; but why should he tell him that he, the drawee, had had value from the drawer? Rule discharged.

[(*n*) Rossiter v. Marsh, 4 Conn. R. 196. See Hemmenway v. Hicks, 4 Pick. 500.]

[(*o*) Allen v. Dickson, 1 Minor, 119; Murray v. Claiborne, 2 Bibb, 300.

In an action of debt by the assignee against the maker of a note, which is authorized by statute in Virginia, the averment that the assignment of it to the plaintiff was *for value received*, is immaterial. For the assignee without value, can as well maintain the action, as the assignee for a valuable consideration. In such case, where the defendant pleaded the bankruptcy of the assignor, a replication stating that the note was given to the assignor *in trust for the plaintiff*, was held to be no departure from the declaration. Marshall C. J. said that the majority of the Court were of opinion that "the duty created by the trust;

Where note not negotiable is expressed to be "*for value received*," it is not necessary in the declaration to set forth any more specific consideration for the maker's promise. (*p*)]

10ᵗʰ. "Delivered," &c. It is (121) not necessary to state that the drawer of a bill [or maker of a note (*q*)] "delivered" it to the payee; it is implied in the allegation that he "made" the bill.

If it be stated that the bill was delivered to the drawee, and that he accepted it, it is (122) not necessary to allege that he delivered it back.

11. "Which," &c. Except in actions against acceptors, or on bills payable within a limited time after sight, the acceptance need not be stated. If stated though unnecessarily, it was once held at nisi prius that it (123) must be proved.

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and which was discharged by the assignment, might be considered as constituting a valuable consideration to support the averment, and prevent the replication from being a departure." Wilson v. Codman, 3 Cranch, 193.

But where the payee of a note endorsed it without recourse, and his assignee brought an action against him on the note on the ground that he had received the money from the maker, the Court appeared to think the count defective for "not stating the endorsement was for a valuable consideration." Welch v. Lindo, 7 Cranch, 159.

Where the declaration stated the assignment to be for *value received*, and the assignment produced in evidence contained no expression of a valuable consideration, but was expressed to be "*without recourse*," the variance was held immaterial. Wilson v. Codman, 3 Cranch, 193.]

[(*p*) Dugan v. Campbell, 1 Hammond Ohio R. 115.

(121) Churchill v. Gardner, 7 Term Rep. 596. In an action by the payee of a bill against the acceptor, the declaration stated that the drawer made his certain bill of exchange, but there was no allegation that he delivered it to the plaintiff, and the defendant demurred specially for that cause; but the Court was clearly of opinion that there was no foundation for the objection; the delivery of the bill to the plaintiff being sufficiently implied in the allegation that the drawer "made" the bill.

[(*q*) Binney v. Plumley, 5 Verm. R. 500.]

(122) Smith v. M'Clure, 5 East's Rep. 476. The plaintiff declared on a bill payable to his own order, and averred that he delivered it to the defendant, to whom it was addressed, and that he accepted it according to the custom of merchants, by reason of which premises, &c. the defendant became liable to pay. The defendant demurred specially because it was not alleged that the defendant delivered back the bill: sed per Lord Ellenborough, "the acceptance must be considered as perfect; and if so, it gave the plaintiff a right to sue upon it: if, after the acceptance, the defendant improperly detained the bill, the plaintiff might nevertheless sue him upon it." Judgment for the plaintiff.

(123) Jones v. Morgan and another, 2 Camph. 474. In an action on

But the contrary has since been determined by the Court of King's Bench. (124)

12. "On," &c. Where the time when a bill or note is payable depends on the presentment for acceptance, and the action is against the drawer of a bill, or the endorser of a bill or note, this should be the very day of the presentment; in other cases, exactness as to the day is not requisite.

If, however, the plaintiff allege in terms that the acceptance was made before the time limited by a bill for its payment, it has been laid down that he will (125) be precluded from giving in evidence an acceptance afterwards; but this may, perhaps, be doubted. (126)

Though the time when a bill or note is payable depend upon the presentment for acceptance, as where it imports to be payable at a given time after sight; if the action be against the acceptor, or maker, exactness as to stating the day of presentment is not essential. (127)

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a bill, drawn on Burt by the defendants, payable to their own order, and endorsed by them to the plaintiff, the declaration unnecessarily stated an acceptance by Burt. And Lord Ellenborough was of opinion that the plaintiff, having stated an acceptance, was bound to prove it.

(124) Tanner v. Bean, 4 B. & Cr. 312. In assumpsit against endorser, on a bill payable after date, the declaration stated that the drawee accepted it. Plaintiff did not prove the acceptance at the trial, and Littledale J. thought it unnecessary, but he saved the point: on motion for a nonsuit, the Court were clear the proof was not requisite: the allegation of an acceptance was not in the nature of a description of the instrument; acceptance did not vary the responsibility of the endorser in case of nonpayment, and the averment therefore was immaterial. Rule to show cause refused.

(125) Jackson v. Pigott, Lord Raym. 364, 12 Mod. 212. In an action against the acceptor of a bill, per Holt C. J.—"If the plaintiff declares that the acceptance was before the day appointed for the payment, and that the defendant accepted to pay according to the tenor and effect of the bill, and it appears upon the evidence that the acceptance in fact was after the day of payment, this would be against the plaintiff."

(126) See Young v. Wright, post, p. 437. n., and Peppins v. Solomons, 5 T. R. 496.

(127) Forman v. Jacob, 1 Stark. 46. Endorsee against acceptor on bill dated Constantinople, and payable fifty days after sight. The declaration averred an acceptance on the day the bill bore date, whereas the acceptance was not till five weeks afterwards: it was objected that this was a fatal variance, but Lord Ellenborough held otherwise, and plaintiff had a verdict.

N. The date was 11th August; the acceptance 19th September.

[In an action against the acceptor of a bill, if the declaration allege in the usual form the drawing of the bill and its subsequent acceptance, it is no variance to prove that the defendant wrote his acceptance of the bill before it was filled up and signed by the drawer. (*r*)]

12ª. "At A. B. and Co's." Though an acceptance import to make the bill payable at a banker's or any other particular place, this need not be stated in an action against the acceptor, nor, perhaps, in an action against the drawer or an endorser, unless the acceptance is prior to the first of August, 1821, or unless it express that the party accepts the bill payable there, "and not otherwise or elsewhere." (128)

If it be expressed in the acceptance that the bill is to be payable there "and not otherwise or elsewhere" (128), or if the acceptance be prior to 31st August, 1821, the acceptance must be stated as a special acceptance, to pay at such place. (129)

[Although the statute 1 & 2 Geo. IV. c. 78, requires the acceptance of an inland bill to be in writing, it is not necessary, in declaring on such a bill, to state the acceptance to have been in writing. (*s*)

A declaration against the endorser of a note which was not made payable on the face of it at any particular place, but by the agreement of the parties was to be paid at a certain bank, did not set out this agreement, but averred a demand of payment at the same bank "where the said note was payable." It was held that the declaration was sufficient after verdict for the plaintiff. (*t*)

[(*r*) Molloy v. Delves, 5 M. & P. 275; S. C. 7 Bing. 428, and 4 C. & P. 492.]

(128) See 1 & 2 Geo. IV. c. 78. § 1. antè, p. 182.

[Where a note is made payable at a specified time and place, no presentment there is necessary, in order to charge the maker. It is however held in Ohio that where the declaration on such a note against the maker avers a presentment at the time and place, it will be necessary to prove it as alleged, tough the averment be immaterial. Conn v. Gano, 1 Hammond's Ohio R. 486. Pease J. dissented.]

(129) See Rowe v. Young, 2 Brod. & Bing. 165.

[(*s*) Chalie v. Belshaw, 4 M. & P. 275; S. C. 6 Bing. 529.]

[(*t*) Brent's Executors v. Bank of the Metropolis, 1 Pet. Sup. C. R. 89.]

In declaring against the drawer of a bill payable at a certain time after date, it is not necessary to set forth an acceptance which has been made on it making it payable at a particular place. (*u*)]

12[3]. "Afterwards," &c. It is (130) not a material variance, that an endorsement is stated to have been made before, and is proved to have been made after the bill became due.

[12*. "Their certain endorsement," &c. Where the declaration on a note stated it to be endorsed by A. B., and the note produced had the word *agent*, endorsed after A. B.'s name, the variance was held to be immaterial. (*v*)

In a suit by an endorsee against endorser, if a bill of particulars state the endorsement to be in blank, and it be filled up at the trial, it is no variance. The bill of particulars only applies to the money counts, there being a special count on the note; but even as to the money counts the variance is immaterial. (*w*)

It is sufficient in a declaration to set out the name of an endorser as it is written on the bill or note, even where only an initial is used instead of the middle name. (*x*)]

[(*u*) Harris v. Packer, Tyrw. R. 370, note.]

(130) Young and another v. Wright, 1 Campb. N. P. C. 139. Action by endorsees against the drawer of a bill. The declaration stated all the endorsements to have been made before the bill became due; but it appeared that the immediate endorsement to the plaintiffs had been made after the bill had become due. Lord Ellenborough, on the authority of Russell v. Langstaffe, Dougl. 514 (antè, p. 145), held that the variance was immaterial; he said that this was the converse of that case, but was to be governed by the same principle.

[S. P. Parsons v. Parsons, 5 Cowen, 476; Penn v. Flack, 3 Gill & Johns. 369. But in Estell v. Vanderveer, 2 South. R. 782, in an action against the endorser of a note, where the declaration averred that the note was endorsed on the day of the date, the Court held that the plaintiff could not prove that it was endorsed after it became due.]

[(*v*) A declaration on a promise to indemnify the second endorser of a note if he had to pay it, stated the note to be made by a company payable to A. B. or order, and by him endorsed; the note produced had the word *agent* endorsed upon it, after A. B.'s name, and he was proved to be agent of the company. The variance was held immaterial, although a majority of the Court thought that A. B., by endorsing the word *agent* after his name, avoided all personal liability as endorser. Mott v. Hicks, 1 Cowen, 513.]

[(*w*) Norris v. Badger, 6 Cowen, 449.]

[(*x*) Hudson v. Goodwin, 5 Har. & John. 115.]

12th. "Their proper hands." This is an unnecessary allegation, being implied in the preceding words; it is better to omit it, because, although it would probably be held to be surplusage (131), there are cases (132) in which it might occasion questions and delay.

13. "The contents." On an endorsement for less than the full sum mentioned in the bill or note, the plaintiff must (133) show that the residue was paid.

14. "Or his order." These (134) words are unnecessary. A full and a blank endorsement are stated in the same manner.

15. "And the said Peter," &c. Every endorsement essential to a transfer must be stated; unnecessary ones may (135) be omitted.

Where the plaintiff would omit an endorsement, he should represent that which precedes the endorsement to be omitted to have been made in favor of the person who is endorsee upon that which follows.

Thus, if a bill payable to A.'s order be endorsed by him in

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(131) Booth v. Grove, antè, p. 426. n.

(132) Levy v. Wilson, 5 Esp. N. P. C. 180. In an action by an endorsee of a bill, the declaration stated the endorsement to have been made by the payee, "his own hand-writing being thereunto subscribed." The bill appeared to have been endorsed by procuration. Lord Ellenborough held this variance fatal, and nonsuited the plaintiff. See also Jones v. Mars, antè, p. 426., sed vide Booth v. Grove, ibid.

(133) Hawkins v. Gardner, 12 Mod. 213. The declaration stated that the defendant drew a bill for 46*l.* 19*s.*, payable to Blackman or order, and that Blackman endorsed 43*l.* 4*s.* thereof to the plaintiff; the Court held, that an endorsement for part only of what was due upon the bill was bad, and said, if Blackman had brought an action for part, he must have acknowledged satisfaction for the residue.

(134) Vide antè, p. 109.

(135) In Peacock v. Rhodes, antè, p. 104. note (12), the bill was payable to Ingham, and endorsed by him and by John Daltry; the plaintiff declared as endorsee of Ingham, and recovered.

Chaters v. Bell and others, 4 Esp. N. P. C. 120. The declaration stated, that a bill was drawn payable to Curry, by him endorsed to the defendant, and by the defendant to the plaintiff. There were, in fact, several intermediate endorsements between Curry and the defendant, which were omitted in the declaration; and it was contended that the plaintiff should have either declared, as the immediate endorsee of the payee, or have stated all the endorsements. But Lord Ellenborough overruled the objection. Vide Waynam v. Bend, and Critchlow v. Parry, post.

blank, and delivered to B. and endorsed by B. to C., if C. would omit stating B.'s endorsement, he should state that A. endorsed it immediately to him; C.

16. "Of which," &c. This (136) allegation is unnecessary.

17. "That an usance," &c. A neglect to show the duration of an usance is (137) fatal upon demurrer, (unless, perhaps, where it is alleged that the bill was presented on the day it was payable,) but upon demurrer only. (138.)

18. "The allegation of presentment." In an action against the maker of a note or the acceptor of a bill, the presentment is never stated, unless the bill or note is made payable, either by the original frame of it, or by the form of the acceptance, at a particular place only.

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(136) Anon. Pract. Reg. 358. In an action by an endorsee of a note against the maker, the defendant demurred, and showed for cause, that it was not alleged that he had notice of the endorsement; but by the Court, "there is no need of notice." Judgment for the plaintiff.

Reynolds v. Davies, in error, 1 Bos. and Pull. 625. In an action by an endorsee against the maker of a note, the declaration stated the endorsement and delivery by the payee, and then averred (in the usual form) the defendant's liability and promise to pay to the plaintiff. There was no averment of notice of such endorsement. The defendant demurred specially, but did not assign such want of notice as a cause of demurrer. After judgment in the King's Bench for the plaintiff Davies, a writ of error was brought in the exchequer chamber, and such want of notice assigned as error. But Eyre C. J. said, "the promise to pay contained in this note is to the payee or his order; immediately then on the order being made to the endorsee, the promise attaches: nor can we add the qualification of notice to a promise which was not originally qualified with that circumstance." Judgment affirmed.

(137) Buckley v. Campbell, Salk. 131. The plaintiff declared upon a bill drawn at Amsterdam and payable in London, at two usances, and did not show what the two usances were: and the Court gave judgment for the defendant; because they could not take notice of foreign usances, which are longer in one place than another.

(138) Smart v. Dean, 3 Keb. 645. In an action on a bill from Paris, payable here at double usance, the defendant pleaded payment; and on issue taken thereon, demurred, and objected that it was not alleged that double usance was two months: sed non allocatur, "It being a known term among merchants, that usance is a month, double two months; and being averred he had not paid in two months, it is well enough, the defendant having waived advantage hereof by pleading payment:" but by Twysden J., "had it been on demurrer to the declaration, the plaintiff should have averred a particular custom that usance signifieth a month." Judgment for the plaintiff.

In an action against the drawer of a bill, or the endorser of a bill or note, it is essential to state, either that (139) the bill or note was presented, that the drawee or maker could not be found, or that the defendant, had he paid the bill, would have had no remedy against them.

[A general averment in a declaration against the drawer of a bill, that the drawee, though often requested, had not paid, is not sufficient. A presentment to the drawee must be specially set forth, and notice to the drawer. (*y*)

A general averment of due diligence is not sufficient in an action against the endorser of a bill or note, presentment and notice must be specifically stated. (*z*)]

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(139) Mercer v. Southwell, 2 Show. 180. The declaration against the drawer of a bill stated that the drawee did not accept, but did not allege that the bill had been shown or tendered to him; and upon demurrer on this account, the omission was held fatal; for, otherwise, it would be in the plaintiff's power to charge the drawer, when perhaps the drawee was ready to pay the money according to the tenor of the bill, if it had been tendered to him.

Rushton v. Aspinwall, Dougl. 654—680. In an action by endorsee against endorser upon a bill payable three months after date, the declaration stated that the bill, after the making thereof, to wit, on the same day and year aforesaid (referring to the day the bill bore date), was presented for acceptance, and accepted; yet the drawee, although afterwards, to wit, on the same day and year aforesaid, requested, did not pay; of which the drawer, the payee, and first endorser, and the acceptor, had notice: by reason whereof defendant became liable to pay; and being so liable, on the same day and year promised to pay. After verdict and judgment for plaintiff, the Court of King's Bench, upon a writ of error brought, held the declaration bad; because, it did not show that payment was demanded of the acceptor when the bill became due, or that notice was given to the defendant of his refusal to pay; and that though it was stated that he had promised to pay, that promise was stated as an inference of law, and the declaration did not contain premises from which that inference could be drawn; and the judgment was reversed. See also Parker v. Gordon, antè, p. 211, and Ambrose v. Hopwood, antè, p. 202.

[But in an action against the endorser of a note in New York, the declaration which merely alleged a demand of payment of the maker in general terms, viz. "although often requested," &c. and did not state any demand on him on the last day of grace, was held good after verdict, on motion in arrest of judgment. Per curiam. "Even if the objection were good on demurrer, it is now too late. The fault is no more than the defectively setting out of a title, which is always cured by a verdict." Leffingwell v. White, 1 Johns. Cas. 99.]

[(*y*) Treadway v. Nicks, 3 M'Cord, 195.]

[(*z*) Disborough v. Vanness, 3 Halst. R. 231. Action against the endorser of a note. It was held to be an essential defect in "the *state of*

If a bill be stated to have been accepted payable by certain persons at a particular place, so as to make presentment at that place essential, an averment in an action against the drawer, of a presentment to those persons generally, without saying at that place, is insufficient.

But an allegation that it was presented to them "according to the tenor and effect of the bill, and the acceptance thereof," will (140) be sufficient.

Upon an acceptance making a bill payable at a particular house, it is sufficient to aver that it was presented at that house, and that the persons of that house were requested to pay it. (141)

It is not necessary to state more particularly to whom it was presented there. (141)

Whether the action be against endorser (141), drawer (142), or acceptor.

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demand" that it only averred due diligence by the plaintiff to recover the debt, without alleging presentment or notice, and that the defect was not cured by a verdict for the plaintiff.]

(140) Huffam v. Ellis, M. 51 Geo. 3. In an action against the drawers of a bill, the bill was stated in the declaration to have been accepted by Robertson, payable at the house of Kensington, Styan, and Adams, and a presentment to them was averred to have been made "according to the tenor and effect of the said bill, and the said acceptance thereof," without saying *at the house:* to this the defendant pleaded a judgment recovered, and judgment was given by the Court of King's Bench for the plaintiff, the defendants having failed to produce the record of the judgment pleaded. On error to the House of Lords, the want of an averment of a presentment at the *place* where it was made payable was assigned for error; and Andrews v. Hopwood was cited: but the House of Lords affirmed the judgment of the Court of King's Bench, 10th of April, 1811.

[Parks v. Edge, 1 Cro. & Mees. 429; 1 Dowl. Prac. Cas. 643. In a declaration by an endorsee against endorser, it is not necessary to allege a special acceptance at a particular place or a presentment at such place. It is enough to state a presentment to the drawer generally, without stating the acceptance; this being matter of proof.]

(141) Hawkey v. Borwick, 4 Bingh. 135. In an action by endorsee against endorser, it was alleged that the drawee accepted the bill payable at Messrs. Smith, Payne, and Smith's, London, and that when it became due it was presented at the house of Messrs. Smith, Payne, and Smith, who then and there had notice of the several endorsements on the bill, and were requested to pay it, but refused. After verdict for plaintiff, it was assigned for error, that it was not averred that the bill was presented to the drawee, or to Smith, Payne, and Smith: but the Court of Exchequer Chamber held the allegation sufficient, and the judgment was affirmed.

(142) De Bergareche v. Pillin, 3 Bing. 476. In an action against the

If the acceptance make the bill payable at the house of A., an averment that it was presented to A., according to the tenor and effect of the bill and acceptance, is sufficient; it implies that it was presented at A.'s house, for a presentment elsewhere would not be according to the tenor of the acceptance. (143)

If the drawee or maker cannot be found, it is (144) sufficient to aver generally that he was not found, without stating that any inquiry was made for him.

On an allegation that the bill or note was presented, and acceptance or payment refused, the plaintiff cannot (145) give in evidence that the drawee or maker could not be found.

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drawer of a bill, it was alleged that the drawee accepted it payable at Sykes, Snaith, and Co.'s, and that, when it became due, it was duly presented and shown to and at the said Sykes, Snaith, and Co.'s for payment, and payment thereof was then and there required; but the said Sykes, Snaith, and Co. did not pay the sum mentioned in the bill nor any part thereof, nor did the acceptor. Special demurrer on the ground that presentment to the acceptor should have been averred; for, as 1 & 2 Geo. 4. c. 77. made this a general acceptance, there ought to be the same averments as would be required upon a general acceptance: but on argument, the Court thought the averment sufficient, and plaintiff had judgment.

(143) Bush v. Kinnear, 6 Maule & Sel. 210. In an action by endorsee against endorser, the declaration stated that A. B. the drawee, accepted the bill, and by that acceptance appointed the money to be paid at the house of certain persons using the name, &c. of Messrs. Glyn, Mills and Co.; the averment of presentment was, that it was in due manner shown and presented to Messrs. Glyn, Mills and Co., and also to the said A. B. for payment, and they and he were then and there required to pay the same to plaintiff, according to the tenor and effect of the said bill and acceptance thereof and the said endorsement. Special demurrer, on the ground that it was not alleged to have been presented at the house of Glyn, Mills and Co.; but, on argument, the Court held that the averment implied that it was presented according to the tenor of the acceptance, and no presentment but one at the house of Glyn, Mills and Co. would have been according to the acceptance. Judgment for plaintiff.

(144) Starke v. Cheeseman, Carth. 509. In an action upon a bill drawn by the defendant on C. C. of Radcliffe, London, the declaration merely stated that the said C. C. at Radcliffe aforesaid, or elsewhere within the kingdom of England, was not found; and, after judgment by default, it was objected in arrest of final judgment, that it was not shown that any inquiry had been made after him; but it was answered that it was according to the custom among merchants, and the common form in the like cases, and judgment was given for the plaintiff.

(145) R. Leeson v. Pigott, sittings after Trinity, 1788; and see Smith v. Bellamy, 2 Stark. 223.

But if a note be made payable at a particular town, in which the maker has no residence, a presentment at the banking houses there will justify and support an allegation that it was presented there to the maker. (146)

[The averment of a demand upon the maker of a note, and his refusal to pay, is sufficiently supported by evidence of a presentment at his store in his absence. (*a*)]

If the allegation be that the bill was presented by one J. S., that part of the allegation which states that the presentment was by J. S. is immaterial. (147)

[It has been held in several American cases that the averments of demand and notice in the declaration on a bill or note, were sufficiently supported by evidence of any thing which rendered a demand or notice unnecessary. See Stewart v. Eden, and Norton v. Lewis, infra.

In an action against the endorser of a note, one count alleged a demand on the makers on the day on which it became due. The court seemed to be of opinion that evidence of due diligence to obtain payment without an actual demand, would support the averment. But it was not necessary to decide the question, as the second count stated that one of the makers had absconded, and alleged a regular demand on the other, according to the facts. Williams v. Matthews, 3 Cowen, 252.

So where no demand had been made of the maker on account of his absence in a foreign country, it was held by Van Ness J. at nisi prius, that an averment of presentment in the common form was sufficient. Cummings v. Fisher, Anth. N. P. 5.

So it has been held that the usual averments of demand and notice in a declaration on a note, are satisfied by proof of a promise to pay the note in consideration of time given, although there has been no sufficient demand or notice. Hosmer J. said, that this mode of declaring, "relying on proof of an excuse for the omission to make demand, or give notice, had too frequently been sanctioned to remain questionable." Norton v. Lewis, 2 Conn. R. 478.

Where it was the usage of a bank, instead of presenting notes which it held, to the makers for payment, to send them a written demand, it was held, in an action by the bank against the endorsers of a note which they had discounted at the bank, and who were acquainted with the usage, that an averment of presentment to the makers for payment, was supported by evidence of a written demand left at their place of business. City Bank v. Cutter, 3 Pick. 414. See post, note (161.)]

(146) Hardy v. Woodroffe, 2 Stark. 319. Action against the maker of a note made payable at Guilford, and allegation that plaintiff showed and presented the note to defendant at Guilford for payment thereof: plaintiff proved that he presented the note at two banks at Guilford, and that defendant lived in London: it was objected that this proof did not support the allegation; but Abbott J. thought otherwise, and that a presentment at Guilford, defendant not being there, was a presentment to defendant: verdict for plaintiff.

[(*a*) Stewart v. Eden, 2 Cain. R. 121.]

(147) Boehm v. Cambell, Gow. 55. In an action by drawer against

In an action against the acceptor of a bill or maker of a note payable on demand, a (148) presentment or demand need not be stated.

19. "On," &c. Unless there be an express averment, that the presentment was made on the day when the bill or note became payable, this (149) must be that very day; where there is such averment, exactness as to the day is, probably, immaterial.

In an action against the acceptor of a bill payable a limited time after sight, if the declaration allege a presentment for payment, a mistake in the day on which such presentment was made is immaterial. (150)

Especially if it be alleged that it was presented when it became due and payable, and it was in fact presented on the day it became due. (150)

[Where the third day of grace falls on Sunday, it is sufficient to aver a presentment on the second day of grace, without averring that the third day of grace was a Sunday. (*b*)

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guarantee of acceptor, averment that the bill was presented for payment by one J. S. at the place where the acceptance made it payable: plaintiff proved a presentment there, but not by J. S.; and Dallas C. J. held the substantive part of the allegation proved, and plaintiff had a verdict.

(148) Rumball v. Ball, 10 Mod. 38. Debt upon a note, by which the defendant acknowledged himself indebted, and promised to pay on demand: it was urged, in arrest of judgment, that it was not alleged that there had been a demand; but the Court held the allegation unnecessary.

(149) See Rushton v. Aspinall, antè, p. 440.

(150) Forman v. Jacob, 1 Stark. 46. In an action by endorsee against acceptor on a bill payable fifty days after sight, the declaration alleged an acceptance 11th of August, and that when the bill became due and payable, viz. on 3d of October, it was presented for payment. It appeared in evidence that the acceptance was not till the 19th of September, nor the presentment for payment till the 11th of November; and it was urged that these mistakes were fatal; Lord Ellenborough thought not, and the plaintiff had a verdict.

[See also Bymer v. Russell, 7 Moore, 266; Norton v. Lewis, 2 Conn. R. 478.

In an action on a note dated March 14th, 1810, payable in 21 months after date, the plaintiff averred that "after the expiration of the 21 months," viz. on the 14th of December, 1811, demand of payment was made and notice of non-payment given to the defendant. This was held bad, on the ground that a note could not be presented for payment until the days of grace had expired. Beck v. Thompson, 4 Har. & John. 531]

[(*b*) Mechanics' Bank v. Gibson, 7 Wend. 460.]

In an action against the drawer of a check, an averment of a presentment after it became due, is held to be insufficient on general demurrer. (*c*)]

19ᵍ. "Did not," &c. In an action against the maker upon a note payable at the house of a third person, if a presentment there be stated, it is not necessary to state a special refusal there: the general allegation at the end of the declaration, that defendant did not pay, will be sufficient; for payment at that house would have been payment by him, and it would not be true that he had not paid, had there been a payment there. (151)

If a bill require a man to pay at a given place, it is a sufficient breach as against him that *he* did not pay there: it is not necessary to allege that no one else did. (152)

[In a declaration on a note payable at a bank, an averment of presentment to the cashier of the bank, his refusal to pay, and that neither the maker nor any one on his behalf then and there paid, is, especially after verdict, a sufficient allegation that the maker did not pay before action brought. (*d*)

In an action against the endorser of a note payable at a spe-

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[(*c*) Glenn v. Noble, 1 Ind. R. 104.]

(151) Butterworth v. Lord Le Despencer, 3 Maule & Sel. 150. Payee against maker on note payable at the house of Wright and Co. A presentment at Wright and Co.'s was stated, and it was alleged at the end of the declaration that the defendant, although often requested, had not paid, &c.; but there was no special allegation of non-payment upon the presentment at Wright and Co.'s. Defendant demurred on this ground; but, on argument, the Court was clear that the general allegation of non-payment sufficiently negatived any payment at Wright and Co.'s, and judgment was given for the plaintiff.

(152) Giles v. Bourne, 6 Maule & Sel. 73. In assumpsit by endorsee of a bill against the acceptor, the declaration stated that on the 22d of February, 1816, J. T. made his bill of exchange, directed to defendant, and required defendant, four months after the date of the bill, to pay him or his order at Messrs. Veres and Co.'s, Lombard street, 940*l*., which bill defendant accepted; and that at the expiration of the time appointed by the bill for payment thereof, viz. on 25th of June, the bill was presented by defendant at Messrs. Veres and Co.'s, Lombard street, for payment, and plaintiffs required him to pay, but he did not. Demurrer, because it was not alleged what date the bill bore, or that no other person paid it at Veres and Co.'s; but the Court said, it must be intended the bill was dated the day it was alleged to have been made, and that defendant's promise was, that *he* would pay at Veres', and that he had refused.

[(*d*) Crenshaw v. M'Kiernan, 1 Minor, 295.]

cified place, an averment of a presentment at that place must be made in the declaration. (*e*)

In an action brought by a bank against the endorser of a note payable at the banking office of the plaintiff, an averment that the note was presented to the maker, and that he refused to pay it, is held to be sufficient, without averring presentment at the bank. (*e*)]

20. "Neither," &c. Where the plaintiff states that the sum of money mentioned in the bill was not paid, this allegation is not (153) necessary.

21. "Nor," &c. This (154) allegation is unnecessary.

22. "Protested," &c. The protest (155) need not be stated in an action on an inland bill; in an action on a foreign one, the plaintiff (156) must either state it, or (157) show

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[(*e*) United States Bank v. Smith, 11 Wheat. 171.]

(153) Starke v. Cheeseman, Carth. 509. The declaration stated that the defendant made three bills of exchange, all of the same date and contents, and by the second required the drawee (the first and third of the said bills not being paid) to pay, &c.; that the drawee was not to be found, and the said sum of money in the said bill mentioned was not paid: after judgment by default, it was objected, in arrest of judgment, that there was no averment that the first and third bills were not paid; but it was answered that the allegation *that the money in the said bill mentioned* was not paid supplied the want of the averment, because the sum was the same in all the bills; and the plaintiff had judgment.

East v. Essington, Lord Raym. 810; Salk. 130. Assumpsit against the acceptor of the following bill, "Pray, pay this my first bill of exchange, the second and third not being paid." After verdict for the plaintiff, it was moved in arrest of judgment, because there was no averment, that the second and third were not paid: sed non allocatur; for per curiam, "though it had been ill upon demurrer, yet it is aided by the verdict; for, if the second or third had been paid, the jury would have found non-assumpsit."

Wegersloffe v. Keene, Str. 214. In assumpsit against the acceptor upon a bill by which the drawer requested him to pay "that his first bill (his second not being paid)" the declaration stated that the defendant promised to pay the money, but had not paid it; the defendant pleaded an insufficient plea, and upon demurrer to the replication, objected that there was no averment that the second bill was not paid; but the objection was overruled, and judgment given for the plaintiff.

(154) Vide post, c. 11.

(155) See Brough v. Parkins, antè, p. 258.

(156) Salomons v. Stavely, cited Dougl. 2d ed. 1684, n. 144. The Court held, on the authority of the precedent in Dunstar v. Pierce, Lill. Ent. 55, that the neglect to allege a protest, in an action on a foreign bill, was matter of form only, and could not be taken advantage of on a general demurrer.

that it was not necessary; but the omission can (158) only be taken advantage of by a special demurrer.

In stating the protest, if the plaintiff allege, "that (159) he protested the bill or caused it to be protested," it will be unobjectionable, if the defendant plead over.

23. "Notice." If the defendant be primâ facie entitled to notice, it is essentially necessary to state that he had (160) notice, or to show that he was not entitled thereto.

Under an allegation of notice, it may be questionable whether evidence can be given of what would excuse notice (161), or whether to let in such evidence, the facts to excuse notice should not be pleaded specially. (161)

[An omission to allege a protest is cured by verdict. Murray v. Clayborn, 2 Bibb, 300.]

(157) In Rogers v. Stephens, antè, p. 294, note (137). Lord Kenyon, and afterwards the Court, held a protest for non-acceptance not necessary to support an action against the drawer, because it appeared he had no effects in the hands of the drawee. See Legge v. Thorpe, antè, p. 303.

(158) Vide suprà, note (156).

(159) Witherby v. Sarsfield, 1 Show. 125. The declaration upon a foreign bill stated that the plaintiff "protested it, or caused it to be protested;" the defendant pleaded that he was not a merchant, and upon demurrer had judgment. A writ of error was brought; and it was then, for the first time, urged that the allegation that the plaintiff protested the bill or caused it to be protested, was uncertain; but the Court thought it well enough, reversed the judgment below, and then judgment was given for the plaintiff.

(160) See Rushton v. Aspinall, antè, p. 440. See the form of averring that the drawer of a bill had no effects in the hands of the drawee, in Legge v. Thorpe, 12 East's Rep. 171.

[A statute of Virginia gives an action of *debt* against the endorser of a bill, but says nothing of the notice to be given him. It was held that it was still necessary in an action against him to aver and prove a notice of protest, and that the omission to aver it in the declaration was fatal. Slacum v. Pomery, 6 Cranch, 221.]

(161) Corey v. Scott, B. R. Tr. 1 Geo. 4; 3 B. & Ald. 619. In an action by endorsee against drawer, the declaration stated presentment for payment and disbonor, whereof drawer afterwards, &c. had notice: at the trial there was no evidence of notice, but plaintiff proved that defendant had no effects in the acceptor's hands: defendant rebutted this proof by showing that he and the acceptor only lent their names to a subsequent endorser. Under these circumstances Abbott C. J. held notice necessary; because, defendant on paying the bill, would have been entitled to sue such subsequent endorser, and, as he thought, the acceptor also. Plaintiff was nonsuited, with leave to move to enter a verdict; rule nisi accordingly. On cause shown, it was urged that under the allegation of notice plaintiff had no right to give evidence of

But where notice is in fact given, though later than the ordinary time, and there are circumstances to make such notice sufficient, this is the proper allegation. (162)

[A general averment of notice is sufficient. (*f*)

If the endorser of a note die before it becomes due, notice should be alleged to his executors, not to him. (*g*)

In an action against the maker of a note by an endorsee, it

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what went only to excuse want of notice, and of that opinion were Bayley and Holroyd Js.; but on the merits, they agreed with Abbott C. J., that defendant was entitled to notice; and the rule was discharged. See 12 East's R. 171.

[See Harris v. Richardson, 4 C. & P. 522.

In Kentucky in an action against the drawer of a bill, if the plaintiff relies on proof of want of funds in the hands of the drawee to excuse notice, it is held that such want of funds must be averred in the declaration. Frazier v. Harvie, 2 Litt. 185.

So in Hill v. Vanell, 3 Greenl. 233, the Court expressly decided that the averment of notice was not supported by evidence of due diligence. But the Court also considered that there was not due diligence proved in the case.

In a case where notice to the defendant was averred in the declaration, Parsons C. J., delivering the opinion of the Court, said, that the facts proved were "not evidence of the notice stated in the declaration. But had the use of due diligence been averred, instead of notice being in fact given, the case would have shown sufficient evidence of such diligence." Blakely v. Grant, 6 Mass. R. 386. The case however turned on another point. But see Norton v. Lewis, antè, p. 443, and Williams v. Matthews, antè, p. 443. It is held that a subsequent promise to pay is evidence to support the averment of due notice. See the cases in Ch. xi. note (26).

In Taunton Bank v. Richardson, 5 Pick. 436, it was expressly decided, that an allegation of notice was supported by proof of an agreement by the defendant to waive notice.]

(162) Firth v. Thrush, 8 Barn. & Cr. 387. In an action against an endorser on a bill due 4th of August, the allegation of notice was in the usual form: it appeared he had no notice till 19th of October, but the delay was satisfactorily accounted for; it was insisted that the circumstances to account for the delay should have been stated, and that the ordinary allegation of notice was not sufficient; but the Court thought otherwise, and plaintiff recovered.

[(*f*) The declaration against the drawer of a bill, after the usual averments of non-acceptance, and protest, &c. proceeded, "of all which said premises, the said defendant, afterwards, to wit, on —— at —— had notice." On demurrer, it was objected that the notice to the defendant of the protest for non-acceptance and non-payment was not sufficiently averred. Kent C. J. delivered the opinion of the court. "The general averment of notice of all the antecedent promises was sufficient, and is conformable to approved precedents." Boot v. Franklin, 3 Johns, R. 208.]

[(*g*) See Stewart v. Eden, post.]

is not necessary to aver or prove notice given the defendant of the transfer of the note to the plaintiff. (*h*)]

24. "To the said John." In an action upon a bill or note stated upon the count to be payable to the order of the plaintiff, it is sometimes (163) usual, though (164) unnecessary, to insert here an allegation that the plaintiff made no order; but the better way, upon a bill or note made so payable, is, to state, according to the legal operation, that it was made payable "to the plaintiff," and then this allegation would be impertinent.

25. "When, &c." In an action against the acceptor of a bill or maker of a note not payable immediately upon presentment, instead of alleging that the defendant became liable, and promised to pay "when he should be thereunto afterwards requested," he is stated to have become liable, and to have promised to pay "according to the tenor and effect of the bill and acceptance" in the one case, and "of the note" in the other.

26. "And, &c." This clause is unnecessary in an action against either the (165) acceptor of a bill or the maker of a note; and it may be doubted whether (166) it is essential in any other.

[(*h*) Dicks v. Barton, 17 Martin, 657.]

(163) It was done in Fisher v. Pomfret, Carth. 403.

(164) Vide Frederick v. Cotton, antè, p. 431.

See Lill. Ent. 90, 29, 41, 44, 55, 73, Lutw. 1589.

Sheldon v. Occarsen, Tr. T. 41 Geo. 3. 12 June, 1801. C. B. Roll. 715. Special demurrer to a declaration on a bill stated to be payable to the *order* of the plaintiff; and the cause assigned was, that it was not stated that the plaintiff had made no order: the Court said, that it was too clear for argument, and gave judgment for the plaintiff. Best Serj. was to have argued for the defendant. S. P. Smith v. M'Clure, 5 East. Rep. 476.

(165) Wegersloffe v. Keene, Str. 214. In assumpsit against the acceptor, an objection was taken to the promise as stated; sed per Fortescue J., "the plaintiff need not set out any promise. In Lowther v. Conyers, which was upon a promissory note, they left out *super se assumpsit*, and yet it was held well enough, for the law raises a promise."

(166) Starke v. Cheeseman, Carth. 509. Salk. 128. After judgment by default in an action against the drawer of a foreign bill, it was objected in arrest of judgment, that it was not stated in the declaration that the defendant promised to pay the money after the protest was

[But in an action against the executors of the endorser of a note, who died before it became due, it was held that an averment in the declaration of notice to the endorser, and a promise by him, could not be supported. (*i*)]

27. "And the said," &c. This averment is not, it is apprehended, ever necessary; the want (167) of it is no ground for arresting the judgment, though there were a demurrer to the court, and no verdict upon it nor any judgment by default.

In an action by a person who has paid a bill, under protest, for the honor of drawer or an endorser, it is sufficient for him to allege that he, according to the usage and custom of merchants, paid the bill: he need not specify to whom he paid it. (168)

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made; but it was answered, that the law did raise the promise upon the custom of merchants, and therefore it was not necessary to lay an actual promise; and the plaintiff had judgment.

[A declaration which stated that the defendant by his note promised to pay A. B. or bearer, and alleging the plaintiff to be the bearer, was on demurrer held good, though it did not allege notice to the defendant, and a consequent liability and promise by him to pay the plaintiff. Dole v. Weeks, 4 Mass. R. 451.]

[(*i*) The endorser of a note died before it became due. In an action on the note against his executors, the declaration alleged notice of the non-payment to him, and a consequent liability, and promise to pay by him. The court held that as the endorser was dead at the time of the notice to him, and alleged promise by him, the evidence did not support the declaration, and nonsuited the plaintiffs. Stewart v. Eden, 2 Cain. R. 121.]

(167) Simmonds v. Parminter, 1 Wils. 185. 4 Bro. Parl. Cas. 604. The declaration upon two foreign bills for the payment of 4000 and 5000 dollars did not state what their value was, and after a demurrer this was urged as a ground to arrest the judgment; but the court gave judgment for the plaintiff, and upon a writ of error that judgment was affirmed.

[In a declaration in Virginia on a bill payable in pounds sterling, it seems that not averring the value of the pounds sterling in the declaration, is not a material defect, the value of pounds sterling being fixed there by statute; but if it be a defect, it is cured by verdict. Brown v. Barry, 3 Dall. R. 365.]

(168) Cox v. Earle, 3 B. & Ald. 430. Declaration against acceptor on bill paid by plaintiff under protest for the honor of the second endorser stated, that plaintiff, according to the usage and custom of merchants, paid the bill under protest: special demurrer, on the ground that it was not alleged to whom plaintiff paid it, or that he paid it to the holder, or that plaintiff thereby became the legal holder thereof: sed per cur., on argument, "payment to a wrong person would be no payment; this payment is alleged to have been according to the usage and custom of merchants, and plaintiff would be bound to prove payment to the person entitled to receive." Judgment for plaintiff.

[In order to recover the expenses of protest and notice, in an action on a bill, which has been paid, they must be specially declared for. (*k*) (*l*)]

[(*k*) Kendrick v. Lomax, 2 Cromp. & Jerv. 405.]

[(*l*) Action on a note dated 15th July, acknowledging a certain sum to be due the plaintiff with interest from the first day of June. Demurrer for uncertainty in not stating what June. Per Curiam. "The count is good. When a day or month is mentioned as antecedent or subsequent to a contract, and the precise day or month is not specified, it means the time nearest to the date of the contract. Here the 1st of June must mean the preceding 1st of June." Whitney v. Crosby, 3 Cain. R. 89.

In Massachusetts notes not negotiable, may be declared on like negotiable notes, in an action by the payee against the maker, or the endorsee against his endorser. See Jones v. Fales, antè, p. 10.

In Virginia, a declaration by the assignee of a note against the maker is not sufficient to maintain the action, if it do not state that the defendant failed to pay the money to the payee of the note as well as to the plaintiff. Norvell v. Hudgins, 4 Munf. 496.

In an action of debt, under the Virginia statute, against the endorser of a bill, the declaration which was for the principal, interest, damages, and *charges of protest*, without averring the amount of the charges, was on that account held bad. The court said that it was "material in the action of debt, that the declaration should state the demand with certainty." Wilson v. Lennox, 1 Cranch, 194.

In assumpsit on a promise to endorse the note of another, the declaration should aver that a note was drawn and tendered for endorsement. Gallager v. Brunel, 6 Cowen, 346.]

CHAP. X.

Remedy upon a Bill or Note by proving it under a Commission of Bankruptcy, or suing out a Commission thereon.

Though the Bill or Note be not due.

Though the Holder did not become so until after the Act of Bankruptcy.

Though the Bankrupt had committed an Act of Bankruptcy before he became Party to the Bill or Note.

In case of Person who takes up the Bill or Note after the Commission.

——— *Accommodation Parties who became so before Notice of any Act of Bankruptcy.*

——— *counter Acceptances, or other Exchanges of Paper.*

——— *Reciprocal Accommodation without specific Exchange.*

——— *Banker accepting Bills and having Bills remitted.*

——— *Accommodation Parties, where entitled to remedy inter se.*

——— *Bill drawn or accepted on account of a Third person.*

——— *Accommodation Parties who became such before, and were continued by renewal after notice of act of Bankruptcy.*

Under Commissions against several Parties.

Where the Bill or note is holden by a Creditor of the Bankrupt as a Security for the Debt.

Proof against the joint and separate Estates of the same Parties.

Interest.

Set-off.

Wherever the holder of a bill or note is entitled to compel a person to pay it, he (1) may, in the event of such person's

(1) In ex parte Dewdney, 15 Ves. 495, Lord Eldon C. held that

bankruptcy, prove the amount under his commission; and whatever would be a defence to a suit (2) will exclude the holder from such proof.

[Except that the holder may prove in respect of a bill or note, although his claim thereon would be barred at law by the statute of limitations, provided it were not so barred when the commission issued. (*a*)]

And a bill or note (3) may be proved before it has become due, deducting, on payment of the dividend, a rebate of legal interest for such time as it may then have to run; and it may, (under certain (4) restrictions) be proved, though the bank-

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where recovery in an action on a bill would be barred by a plea of the statute of limitations, and all relief in equity would be equally defeated by lapse of time, to which courts of equity, in analogy to the statute of limitations, give similar effect, the bill could not be proved under a commission of bankruptcy; and after reasoning on the inconsistency which would result from a contrary doctrine, his lordship observed, "that consideration, among others, furnishes a ground for concluding that the real meaning of the legislature in those acts (the bankruptcy statutes) requiring the Lord Chancellor to give execution to all the creditors, was, that this species of execution should be given to those creditors, who, if a commission of bankruptcy had not issued, could, by legal or equitable remedies, have compelled payment." See 1 Sch. & Lefr. 48. Where the holder has bought bills or notes for less than the money payable upon them, (as in ex parte Lee, 1 P. Wms. 782, where he bought notes for 10*s.* in the pound,) or where he has discounted them, (as in ex parte Marlar, 1 Atk. 150.) as he might have recovered in an action, so he may prove under a commission of bankruptcy, to the full amount.

(2) As to such objections as arise from the form of the bill or note, vide antè. c. 1., also ex parte Adney, Cowp. 460, and ex parte Tootell, 4 Ves. 372. As to the sufficiency of the stamp, vide antè, c. 3. As to the transfer, vide antè, c. 5. Acceptance, c. 6. As to the effect of laches, vide antè, c. 7. As to the legality of the consideration, vide post, c. 12.

[(*a*) Ex parte Ross in re Coles, 2 Gl. & J. 330. Petitioners in December, 1824, applied to prove under a commission which issued 10th July, 1810, two promissory notes, both dated 21st May, 1810. The commissioners rejected the proof, on the ground that more than six years had elapsed since the issuing of the commission, and since the notes became due. On petition, Leach, Vice Chancellor, held, that the claim of the petitioner was not barred, because the commission was a trust for the benefit of all the creditors, and the statute does not run against a trust, and he referred it back to the commissioners to receive the proof. On appeal, Lord Lyndhurst, Chancellor, agreed in opinion with the Vice Chancellor, and affirmed his order.]

(3) 6 Geo. 4. c. 16. § 51.

(4) Vide post, and 6 Geo. 4. c. 16. s. 19. post.

rupt's liability commenced after his act of bankruptcy, and within two calendar months before the date of his commission.

So, the money payable upon a bill or note, if of the requisite amount, though not yet due (5), will be a good petitioning creditor's debt to support a commission of bankruptcy.

And it was held under the repealed provisions of 7 Geo. 1. c. 36. s. 3. and 5 Geo. 2. c. 80. s. 22. that a commission might issue against the drawer of a bill before it became due. (6)

And that the commission would stand, though the bill when due were paid by the drawee. (6)

And it is sufficient, if the money payable to the holder, be, at the time of (7) petitioning, of the requisite amount, though,

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(5) 6 Geo. 4. c. 16. s. 15.

(6) Ex parte Douthat, 4 B. & Ald. 67. Douthat owed Wade 148*l*., and in order to pay him, drew on Eyre and Miller, in favor of Wade or order, at four months' date: Eyre and Miller accepted the bill, and paid it when due; but in the interim Douthat committed an act of bankruptcy, and Wade sued out a commission against him, and proved the bill. Case from chancery on the question, whether under these circumstances there was at the date of the commission a good petitioning creditor's debt? the court certified that there was, and their opinion seemed to be founded not on there being a pre-existing debt to Wade, but on the ground that the statutes 7 Geo. 1. c. 31. and 5 Geo. 2. c. 30. § 22. extended to drawers and endorsers of bills as well as acceptors; and that if such drawer or endorser committed an act of bankruptcy before the bill was due, a commission might at once be sued out thereon.

(7) Brett v. Levett, 13 East's Rep. 213. In an action by the assignee of a bankrupt against the sheriff, and verdict for the plaintiff, a rule nisi to set aside the verdict was granted, on a question as to the sufficiency of the petitioning creditor's debt. The debt arose on two bills of exchange, each for 50*l*., drawn by the bankrupt, and transferred to the petitioning creditor before the act of bankruptcy; both were dishonored by the drawee. The act of bankruptcy was on the 28th Dec. 1809, and the commission was dated 8th Feb. 1810. Each bill became due before the petition for the commission, but *after the act of bankruptcy*. At the time of the *act of bankruptcy*, therefore, there was not a debt of 100*l*. due to the petitioning creditor, but only that sum minus the rebate of interest for the time which the bills had to run; and it was contended that at *that* time there ought to have been such debt due. But the court, after referring to 7 Geo. 1. c. 31. § 3., which disabled a creditor by a bill or note, payable at a future day, from petitioning for a commission in respect of such debt, "until such time as such debt shall become actually due and payable," and to 5 Geo. 2. c. 30. § 22., which removes such disability, held clearly, that it was sufficient if a debt of the requisite amount were due at the time of petitioning. Rule discharged. See also the judgment of Lord Kenyon in Glaister v. Hewer, infrà, p. 455.

by reason of the rebate of interest, it were not of that amount at the time of the act of bankruptcy; but it must be of the requisite amount at the time of the petition.

If, therefore, the bill or note be not *then* due, it would (8) seem that he must be a creditor for such sum as, after deducting the rebate of interest for the time which the bill or note has to run, will leave a debt of the requisite amount.

And upon bills or notes which were due at the time of the petition, interest could not, before 6 Geo. 4. c. 16., be taken into the account, unless it were expressly made payable on the face of the bill or note. (9)

Where it was so payable it might. (9)

And qu. whether 6 Geo. 4. c. 16. § 57. has not made an alteration in this respect so as to enable the holder to reckon interest as part of his debt, whether it be or be not expressly made payable to the bill or note? (10)

The holder (11) may petition for a commission of bank-

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(8) See 7 Geo. 1. c. 31. § 1. & 3., and 5 Geo. 2. c. 30. § 22. & 23. 6 Geo. 4. c. 16. § 15.

(9) Cameron v. Smith, 2 B. & Ald. 305. A commission was founded on an acceptance for 96*l.* 17*s.* 8*d.* The bill was so long overdue that near 5*l.* was due for interest, but no interest was expressly made payable by the bill. The point was reserved whether this debt would support the commission, and, after argument, the court was clear it would not; for, though interest, if expressly reserved, constituted part of the debt, yet if it were not expressly reserved, it constituted damages only, and damages cannot be considered part of the debt.

(10) 6 Geo. 4. c. 16. § 57.

(11) Glaister v. Hewer, 7 Term Rep. 498. The plaintiff being indebted to Hewer in a sum below 100*l.* and to Wilson on a note for 11*l.* 12*s.*, committed an act of bankruptcy; on which, Wilson, for a valuable consideration, endorsed his note to Hewer, to enable him to petition for a commission: the two sums together amounting to above 100*l.* In an action of trover for goods taken by the assignees, brought to try the validity of the commission, the only question was, whether Hewer's were a sufficient debt to support the commission, it not being so when the act of bankruptcy was committed, inasmuch as the whole did not then exist in *him*. Rooke J. thought it was, and on a rule nisi to enter a verdict for the plaintiff, Lord Kenyon said, "the statute only required that there should be an existing debt of 100*l.* in the petitioning creditor; this petitioning creditor had such a debt at the time of petitioning, and that is sufficient to support the commission." Rule discharged.

Bingley v. Maddison, Co. B. L. 20. A note was given by the bankrupt in January, which became due in June. The act of bankruptcy was in October following, and the endorsement in November. The endorsee was the petitioning creditor, and sued out the commission. It

ruptcy, in respect of the money payable upon a bill or note, or may prove the amount under a commission when issued, notwithstanding the bill or note may not have been transferred to him until after the act of bankruptcy committed, and although it were then transferred to him for the very purpose of enabling him to sue out the commission, provided the bankrupt's liability had commenced before the act of bankruptcy: for, the case of a bill or note being one in which the law admits of the assignment of a chose in action, the assignee becomes a creditor as from the time of the original creation of the debt, and not from that of the assignment.

And though the bankrupt may have committed an act of bankruptcy before he became a party to the bill or note, it will not (12) invalidate a commission of bankruptcy issued on the petition of the holder, nor (13) prevent the holder's proving the amount under a commission; provided, in the former case, that there be a subsequent act of bankruptcy sufficient to support the commission (12), and in the latter, that the bankrupt had become such party before the (13) date of the commission; and that the holder had not any (13) notice of a prior act of bankruptcy.

If a person liable upon a bill or note be compelled to take it up in consequence of its dishonor by an antecedent party, he will be remitted to his former right (14). He may, therefore, prove under commissions against such of the antecedent parties as would have been liable to him on the bill or note if he had never parted with it (15): and it is immaterial whether he took up the bill or note before, or after, the bankruptcy. (16)

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was contended, that at the time of the bankruptcy the petitioning creditor had no debt, and that therefore the commission could not be supported. But the Court said that this was a case in which the law allowed the assignment of a chose in action: that the assignment related to the original debt: that the endorsee always came in under the commission, because the endorsement related to the original debt; that it stood thus upon principle; and that the cases were clear, explicit, and positive, and of the highest nature: they therefore held the commission valid.

(12) 6 Geo. 4. c. 16. s. 19. (13) 6 Geo. 4. c. 16. s. 47.

(14) Death v. Serwonters, 1 Lutw. 885 to 888. 7 T. R. 572. 574. 581.

(15) 7 T. R. 572. 574. 581.

(16) Joseph v. Orme, 2 New Rep. 180. The plaintiff, being holder

But if a bill or note be taken up by a person who was not liable thereon, it is essential that he should have taken it up before the act of bankruptcy: otherwise he cannot prove. (17)

By 6 Geo. 4. c. 16. s. 52., any person who at the issuing of the commission shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, [of course including debts by bill or note, or bail in an action thereon,] if he shall have paid the debt or any part thereof in discharge of the whole debt, although he may have paid the same after the commission issued, shall, if the creditor shall have proved his debt under the commission, be entitled to stand in the place of such creditor, as to the dividends and all other rights under the said commission which such creditor possessed, or would be entitled to, in respect of such proof; or if the creditor shall not have proved under the commission, such surety, or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the said commission, not disturbing the former dividends; and he may receive dividends with the other creditors, although he may have become surety, or liable, or bail as aforesaid, after an act of bankruptcy committed by such bankrupt, provided that such person had not at the time when he became such surety, or bail, or liable as aforesaid, notice (17) of any act of bankruptcy by such bankrupt committed.

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of a bill accepted by the defendant, endorsed it for a valuable consideration to Adams. Before the maturity of the bill, a commission of bankruptcy issued against the defendant, and the plaintiff was afterwards obliged to pay the bill to Adams, and now sued the defendant as acceptor. The defendant having received his certificate, obtained a rule nisi to enter an exoneretur on the bail piece: and after cause shown, the Court held that the plaintiff might have proved the bill under the commission, and therefore made the rule absolute.

See ex parte Brymer and Houle v. Baxter, post.

[An endorser of a note fixed before, but paying the note after the insolvent discharge of the maker under the statute of New York of 1813, may recover against the maker. Ainslie v. Wilson, 7 Cowen, 662. But this doctrine is changed by the last revised laws of New York.

A first endorser might maintain an action against the maker, grounded on a payment to the second endorser, made after the latter had endorsed and taken up the note, with fraudulent view to defeat the maker's discharge. Ainslie v. Wilson, 7 Cowen, 662.]

(17) Ex parte Isbester, 1 Rose, 20. Isbester held a bill for 400*l.* pay-

This statute repealed 49 Geo. 3. c. 121., in s. 8. of which a similar provision was contained.

If the drawee of a bill, not being indebted to the drawer nor having effects of the drawer in his hands, accept the bill on his own account (18), without receiving any consideration for such acceptance, he is said to accept for accommodation of the drawer, and if the drawer negotiate such bill for value, though both parties are equally liable to the holder, yet, as between themselves the drawer is primarily liable: he is the principal debtor, and the acceptor is in the (19) nature of a surety.

So, wherever a note or bill is made, drawn, accepted, or endorsed, by or on account of a person who has received no consideration for the same, it is said to be made, drawn, accepted, or endorsed, for accommodation; and if such note or bill be negotiated, the maker, &c. for accommodation, and the person who has received value for the note or bill, are considered as standing in the relative situation of surety and principal.

Before 49 Geo. 3. c. 121, a surety paying after the bankruptcy of the principal could not have proved against the principal in respect of such payment; because, at the time of the bankruptcy, there was no debt. The mere liability to pay, without actual payment, raises no debt on the part of the principal (20); and debts accruing after the bankruptcy could not be proved.

Therefore, if a bill were accepted or endorsed for the

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able to Bell or order, and endorsed in blank by Bell. M'Cullum gave him cash for it, and Isbester wrote over Bell's endorsement, "Pay M'Cullum or order:" the acceptor having failed, Isbester paid M'Cullum 300*l.* the day the bill became due, and he paid the remaining 100*l.* after the commission against the acceptor had issued. Isbester applied to prove under the commission, but was refused: he then petitioned, but Lord Eldon held him not entitled, because he paid when he was not liable to pay: he paid as a volunteer, not by compulsion. But it being doubtful whether the original transaction between Isbester and M'Cullum was intended as a sale of the bill, or as a discount (antè pp. 412, 413.), in the latter of which cases Isbester would have been liable, although his name was not upon the bill, a case was offered; but it does not appear that it was accepted.

(18) See exparte Marshall, 1 Atk. 131., and ex parte Matthews, post.

(19) He is not, strictly speaking, a surety; and for this reason, the words "person liable" were used in 6 G. 4. c. 16. s. 52, and 49 G. 3. c. 121. s. 8. 3 V. & B. 40.

(20) Ex parte Marshall, post.

drawer's accommodation, the acceptor or endorser, taking up the bill after the bankruptcy of the drawer, could not prove in respect of such payment. (21)

But, upon equitable grounds, the surety paying after the bankruptcy of the principal, was allowed, when the creditor had received full payment of his debt, to have the benefit of the creditor's proof against the principal. (22)

And 6 Geo. 4, c. 16. § 52. appears to be applicable in this case. (23) It does not apply until the principal debt is wholly discharged; but it does not express that it is necessary the principal debt should be wholly discharged by the surety. But if this be not so, the surety paying only part, and paying such part after the creditor has proved and received a dividend under the principal's commission, may, when the principal debt is wholly discharged, come in for such part upon the creditor's proof. (24)

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(21) Chilton v. Whiffin, 3 Wils. 13. (1768). Young v. Hockley, 3 Wils. 346. (1772). Vanderheyden v. De Poiba, 3 Wils. 458. (1774). Henderson v. Woodbridge, Dongl. 166. (1782). Ex parte Beaufoy, Co. B. L. 158. (1787). Brooks v. Rogers, 1 H. Bl. 640. (1790). Howis v. Wiggins, 4 T. R. 714. (1792). Snaith v. Gale, 7 T. R. 364. (1797).

(22) Ex parte Marshall, 1 Atk. 129. (1752). Drawer, and acceptor for accommodation of the drawer, became bankrupt, and the holders proved and received dividends under both commissions. The assignees of the acceptor petitioned to stand against the estate of the drawer in the place of the holders, pro tanto as the holders had received under the acceptor's commission; and Lord Hardwicke made the order accordingly. But, afterwards, it being objected that the estate of the drawer was by this means charged doubly, Lord Hardwicke ordered that the petitioners should stand in the place of the holders, pro tanto as the acceptor's estate had paid on the bills, but should not receive any dividend until the holders had received a full satisfaction; and if the surplus of the drawer's estate, after the bill-holders were satisfied, should not be sufficient to answer what the acceptor's estate had paid, then nothing in the order was to prejudice the petitioner's right of action against the drawer for the residue of their demand, notwithstanding the drawer has had his certificate; for it seemed to him that the acceptor was not a creditor under the drawer's petition, because his demand was subsequent to it.

See 13 Ves. 414. 416. 417. Lord Eldon considered the order made in ex parte Walker, (post, 465,) wrong, because, in the event of a surplus after full payment of the bills, the sureties ought to be allowed to come in against the estate of the principal for what they had paid as sureties: Jac. 278, 279, 280. And see Co. B. L. 152. 5th ed.

(23) In ex parte Reed, post, p. 468, it does not appear whether any dividend had been paid.

(24) See n. (22).

49 Geo. 3. c. 121. s. 8. and 4 Geo. 4. c. 16. s. 52. though they enabled a surety to prove in certain cases where proof was previously inadmissible, did not enable him in those cases to sue out a commission. Therefore payment by a surety, after the bankruptcy of the principal, does not constitute a good petitioning creditor's debt (25); although it may be proved under a commission when issued.

Where bills or notes are exchanged, the doctrine of suretyship does not apply. (26)

If, for example, A. accept a bill drawn upon him by B., in consideration of B.'s accepting a bill drawn upon him by A., each party is primarily liable on his own acceptance (27): each acceptance is given for sufficient consideration, and raises a debt from the acceptor to the drawer; (26)

And formerly such debt was allowed to be proved under a commission against the acceptor, although the drawer had not taken up his own acceptance (28):

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(25) Ex parte Holding, 1 Glyn & J. 97. 30th September, 1820, Cook accepted a bill for the accommodation of Holding; who, on the 26th of January, 1821, surrendered himself to prison in discharge of his bail, and lay in prison more than two months. On the 29th of March, Cook paid the bill, and thereupon sued out a commission. But, on petition to supersede it, Leach V. C. held, that this payment being made by Cook after the act of bankruptcy, could not create a debt to support a commission; and it was accordingly superseded.

(26) Rolfe v. Caslon, 2 H. Blackst. 570. Rolfe and Caslon drew two bills, of the same tenor and date, on each other, and each accepted the other's bill, neither having effects of the other in his hands. Twenty days before the bills were due, Caslon became bankrupt. He had endorsed the bill with Rolfe's acceptance, in part satisfaction of a larger debt, and the creditor proved his whole debt, and received a dividend. Rolfe paid the difference of the bill he accepted, allowing for the dividend, and now sued Caslon on his acceptance and for money paid; Caslon pleaded his bankruptcy. Verdict for the plaintiff, with liberty to the defendant to move to set it aside. On motion accordingly and rule nisi, it was urged for the plaintiff that this acceptance could not have been proved under the commission, because it created no debt to Rolfe, unless he paid the bill which Caslon drew; and at the time of the bankruptcy it was uncertain and contingent whether he would pay such bill; but the Court was clear that the mutual acceptances constituted a debt on each side; and that the defendant's acceptance might have been proved under the commission, and that therefore the certificate was a bar. Rule absolute. Vide also Buckler v. Buttevant, post, p. 461, note (33).

(27) In Cowley v. Dunlop, post, p. 462, all the judges concurred on this point.

(28) Jacob, 278.

But it afterwards became the practice to refuse the proof; or, if the proof were admitted, to retain the dividends until the party claiming against the bankrupt had taken up his own acceptance.

Lord Thurlow, in one case (29), admitted the proof, and retained the dividend; but, it is said, he afterwards doubted whether, in admitting the proof, he did not go too far. (30)

Lord Loughborough refused the proof. (31) Lord Eldon has admitted it, upon bills remitted to a banker, to cover his acceptances for the bankrupt's accommodation. (32)

Where acceptances are exchanged, if either party be called upon to pay both acceptances, his remedy is upon the other's acceptance, and not upon any implied promise of indemnity, as in the case of principal and surety (33);

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(29) Ex parte Lord Clanrickarde, Co. B. L. 160. (1787.) Griffin gave Lord Clanrickarde his acceptance for 60*l.* 17*s.* 9*d.*, and an acceptance of Turner's for 200*l.* Lord Clanrickarde being indebted to Griffin, gave him, on receipt of Turner's acceptance, two drafts for the amount of the acceptances and the debt, which drafts Griffin discounted for value. Griffin became bankrupt before his acceptance was due; and his acceptance being dishonored, was taken up by Lord Clanrickarde. Turner's acceptance was also dishonored, and Lord Clanrickarde petitioned for liberty to prove against Griffin, as a debt due to him before the bankruptcy, the amount of the two acceptances. Lord Thurlow admitted the proof, but staid the dividend until the account relative to the other bills should be finally settled. But, it is said, he afterwards expressed a doubt to Lord Eldon, then Attorney-General, whether he had not gone too far in permitting Lord Clanrickarde to prove: 4 Taunt. 205.

(30) 4 Taunt. 205.

(31) Ex parte Ward (1794) at 4 Taunt. 205. Petition to be allowed to prove on cross bills of exchange. Lord Loughborough C. held that the petitioner, not having taken up his own bills, could not be allowed to prove; and dismissed the petition.

Ex parte Everett, (May 3, 1800.) Cit. 4 Taunt. 204. The assignees of Dickson petitioned that they might be at liberty to prove a debt under the commission against Caldwell and Co., who had accepted bills for Dickson; and Dickson had given them counter bills, which were not then paid. Lord Loughborough held they could not prove the debt until the bills accepted by Dickson had been taken up.

(32) Ex parte Bloxham, post.

(33) Buckler v. Buttevant, 3 East's Rep. 72. The defendants gave the plaintiffs their bills, accepted by third persons, in exchange for the plaintiff's acceptances of bills drawn by the defendants on him. Each bill tallied in amount with that for which it was exchanged, except that in one instance two bills were given in exchange for one of the aggregate amount of both; and in another instance there was a differ-

And the party taking up the other's acceptance after the

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ence (between the bills last exchanged) of a few shillings, which were paid at the time, in order (as it was expressed) "to finish the transaction." They also agreed in dates, except that in two instances bills were made payable two days earlier than those for which they were respectively exchanged. The defendants' letters, in which they enclosed their remittances, always spoke of "valuing" on the plaintiff "for the same amount:" and the whole correspondence pointed at nothing else than an exchange of paper. The defendants became bankrupt; when the commission was issued the plaintiff had paid the whole amount of his acceptances to the holders, except 49*l.*, and he proved the money so paid, under the commission. He afterwards paid the balance of 49*l.*, and brought this action for money paid, to recover that sum. All the bills received by the plaintiff from the defendants were dishonored. A verdict was found for the plaintiff, subject to the opinion of the Court. The Court held that this was an absolute exchange of acceptances; that each party's remedy against the other was upon the other's bills only; and that therefore this action, which was founded on an implied promise, and not on the bills, could not be supported. Postea to the defendant. Vide Toussaint v. Martinnant, 2 Term Rep. 100.

Cowley v. Dunlop, 7 Term Rep. 565. The Peters and Dunlops exchanged acceptances to the amount of 3000*l.* and upwards, under an agreement that each should provide for their own acceptances. Both houses became bankrupt, and obtained their certificates. The Peters paid part of their acceptances; and their assignees paid dividends upon the rest, and also upon Dunlop's acceptances. Dunlop's acceptances were also proved under Dunlop's commission, and a dividend paid thereon. The Peters' assignees having paid considerably more than the Peters' proportion upon the bills, brought an action for money paid against the Dunlops: the question was, whether their bankruptcy was a bar? After two arguments, the Court was divided: Lawrence and Grose Js. held that the plaintiffs were not entitled to recover, and they are reported to have expressed their opinion, that, upon the exchange of the acceptances, a debt arose upon each bill from the acceptors to the drawers, which debt the drawers, had they been holders of the bills at the time of the bankruptcy of the acceptor, might have proved under the acceptor's commission; and their having negotiated the bills made no difference; because, when the bills were returned to them, they were remitted to their former right, and stood in the same situation as if they had never parted with the bills; and they denied that they stood in the relative situation of principal and surety. But afterwards, in Buckler v. Buttevant, 3 East, 83., Lawrence J. said, "Grose J. and he were misunderstood if it were imagined they considered that the amount of the bills given by the Dunlops could have been proved by the Peters under the Dunlops' commission; they did not suppose that, but only endeavored to show that the Dunlops having received a consideration for their own acceptances in the acceptances of the Dunlops, could not resort to an action upon an implied assumpsit against the Dunlops on the ground of having paid the acceptances of the letter as well as their own." Ashhurst J. considered it as a mere case of principal and surety. Lord Kenyon was of opinion that each party was primarily liable on his own, and surety on the others', acceptance,

holder has proved it and received a dividend under the other's commission, cannot make any further proof in respect of such bill. But, upon equitable principles (34), if not under 6 Geo. 4. c. 16. s. 52., he will be entitled to the benefit of the holder's proof;

And in such case, if the bankrupt acceptor obtain his certificate, the other party will be barred at law: for, the certificate is a bar to all claim upon the bill (35); and it is only upon the bill that claim (36) can be made.

The law is the same where the acceptances exchanged are not the acceptances of the parties to the exchange, but of other persons (37);

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and that, therefore, the money paid after the bankruptcy could not have been proved under the commission: but if the bills, though once negotiated, had come back again to the Peters, they would have been remitted to their better right, and might have proved their debt under the Dunlops' commission; but they could not prove the bills after proof by the holders: and he, therefore, thought the plaintiffs entitled; but, as the Court was divided, no judgment was given.

(34) Antè, p. 459.

(35) See Lord Kenyon's judgment in Cowley v. Dunlop, 7 T. R. 581.

(36) Buckler v. Buttevant, and Cowley v. Dunlop, antè, pp. 461, 462.

(37) Buckler v. Buttevant, antè.

Ex parte Hustler, 1 Glyn. & Ja. 9. (1821.) Six persons carried on the business of bankers in partnership, at Bishop Wearmouth, under the firm of Jacksons, Goodchilds, and Co., and in London under the firm of Goodchilds, Jacksons, and Co.; and two of them were in partnership in London under the firm of John and William Jackson. Gowland accepted a bill drawn upon him by John and William Jackson, in consideration of a bill for the same amount drawn by Goodchilds, Jacksons, and Co. upon and accepted by Jacksons, Goodchilds, and Co., but without John and William Jackson's endorsement; and at the same time the interest was settled as between the two bills becoming due at different times. Gowland paid his own acceptance, and upon the bankruptcy of Jacksons, Goodchilds, and Co. proved their acceptance under their commission, stating in his affidavit, that he had received no satisfaction or security for it, and that the consideration was money advanced: the commissioners allowed Gowland to prove the amount of his acceptance against the estate of John and William Jackson, and on petition to expunge such proof, Leach V. C. held the bill accepted by Gowland was to be considered as an ordinary accommodation acceptance, for which Jacksons, Goodchilds, and Co.'s bill was only a security, and that having paid his acceptance before the bankruptcy, the proof was rightly admitted; but on appeal Lord Eldon C. said, "the question is, whether this transaction was not an exchange of paper—whether Gowland was not to look for payment to the bill put into his hands?" and he held that it was an exchange of paper, that the consideration of Gowland's acceptance was the bill he received at the same time, and therefore the proof was not admissible.

And where notes are given in exchange one for the other (38); and where bills are given in exchange for notes. (39)

It is not essential (40) that the bills exchanged should agree precisely in amount, or in the times at which they respectively become due: any difference in these respects is merely evidence upon the question whether the bills were really exchanged or not.

The money payable upon a counter acceptance will (41)

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(38) Ex parte Beaufoy, Co. B. L. 158. (1787). Beaufoy, for accommodation of Mitchell and Cleeter, gave them his note for 400*l*., which they deposited with their bankers, as a collateral security, to induce the bankers to accept and pay Mitchell and Cleeter's bills. This note was afterwards renewed. Beaufoy afterwards gave Mitchell and Cleeter another note for 400*l*., which they endorsed, and deposited with the bankers; and, in exchange for the last-mentioned note, Mitchell and Cleeter gave Beaufoy their note for 400*l*. On the 13th of April, 1785, a commission of bankruptcy issued against Mitchell and Cleeter; and on the 14th, Beaufoy, being called upon by the bankers to take up his two notes, gave them his bond for the amount, and the notes were returned to him. He then petitioned to be allowed to prove a debt of 800*l*., being the amount of his own two notes; but Lord Thurlow ordered that he should be at liberty to prove Mitchell and Cleeter's note, and dismissed the petition as to the rest.

(39) Ex parte Maydwell, Co. B. L. 157. (1785). Stevens, for accommodation of Prior, joined with him in a note for payment to Maydwell of 95*l*. 15*s*., on the 18th, and 203*l*. on the 22d of January; and Maydwell, in consideration thereof, accepted two bills drawn on him by Prior, dated respectively the 16th and 29th of October, and payable three months after date, one for 95*l*. 15*s*., the other for 203*l*. Before the note or either of the bills became due, commissions of bankrupt issued against Stevens and Prior. Maydwell paid the bills when they became due, and then petitioned to prove the note under Stevens's commission. Lord Thurlow ordered accordingly.

(40) Vide Buckler v. Buttevant, antè, p. 461.

(41) Sarrat and another v. Austin, 4 Taunt. 200. In trover by the assignees of a bankrupt against the sheriff for goods taken in execution, the only question was as to the sufficiency of petitioning creditor's debt. He and the bankrupt had drawn two bills on each other of precisely the same tenor and dates, and each had accepted the other's bills. Before any of the bills became due, the bankrupt committed an act of bankruptcy, upon which a commission was issued founded upon the acceptances so given by the bankrupt. Not one of the bills was due or paid when this action was brought. A verdict was found for the plaintiffs, with liberty to the defendant to move to set it aside and enter a nonsuit. On rule nisi accordingly and cause shown, three manuscript cases were cited to show that where there are cross acceptances neither party can prove under a commission of bankruptcy, until he has taken up his own acceptance. Mansfield C. J. said, "If those cases had not been mentioned, I should have had no doubt that either party might prove: that the debt is barred by the certificate has

not be a good petitioning creditor's debt to support a commission: unless it appear that the petitioning creditor has taken up his own acceptance.

Mere reciprocal accommodation, without specific exchange of bills or notes, will not create a debt on either side. (42)

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been decided; why is it barred? because it might have been proved under the commission: it is strange to say then that it cannot be proved; either the one or the other must be wrong." And after time taken to consider, his Lordship, in delivering the opinion of the Court, said, "this question depends on the construction of 7 Geo. 1. c. 31. and 5 Geo. 2. c. 30. taken together: the preamble of the former act only contemplates the case of bills and other securities being taken for *goods sold*, and has not the least mention of their being taken where a debt is not clearly due. The act does not apply to debts in their nature contingent. This debt, though not contingent on the face of the instrument, is thus far in its nature contingent that, until the party taking the bankrupt's acceptance shall have paid his counter bill, the Court of Chancery will restrain him from receiving any dividend: and it would be a singular construction of the statutes, that a man, who will not be entitled to receive a shilling out of the bankrupt's estate unless he take up his own acceptance, should be able to petition for a commission. And no case being cited to show that he can, the Court upon principle think the debt not sufficient to support the commission." Rule absolute.

(42) Ex parte Walker, 4 Ves. 373. (1798.) Various accommodation transactions had for many years taken place between Caldwell and Co. and the Brownes. The former were the bankers of the latter. A commission of bankruptcy issued against Caldwell and Co. in March, 1793, and in the same month the Brownes became bankrupt. An account was then taken of the mutual debts and credits. That account consisted, first, of a cash account, which included good bills as well as payments in cash; and secondly, of a bill account. The result was, that on the cash account the Brownes were indebted to Caldwell and Co. in the sum of 40,716*l.*, and that on the bill account Caldwell and Co. had received from the Brownes bad bills to the amount of 305,149*l.* 19*s.* 10*d.*, and the Brownes had received from Caldwell and Co. bad bills to the amount of 204,910*l.* 5*s.* Of the bad bills received from Caldwell and Co. the Brownes had negotiated bills to the amount of 196,589*l.* 6*s.* 4*d.*, and of those received from the Brownes, Caldwell and Co. had negotiated bills to the amount of 126,855*l.* 11*s.* 10., having retained the residue (viz. 178,294*l.* 8*s.*) at the request of the Brownes. All the bills received by the Brownes were discountable, and upon most of them they had received the full value; and Caldwell and Co. had no consideration for them but the bad bills received from the Brownes. Putting then the cash account out of the question, the Caldwells were primarily liable for the bills they had negotiated; and the Brownes were primarily liable on the bills the Brownes had negotiated; and the liability of the Caldwells for the debt of the Brownes exceeded the liability of the Brownes for the debts of the Caldwells by 69,733*l.* 14*s.* 6*d.* All the bills (or nearly so) which the Brownes had negotiated were proved against the estate of Caldwell and Co., and by

Each party in such case becomes surety for the other on the bills and notes negotiated by the other; and until obliged to pay such bills or notes, he acquires no right to sue the other, or, in the event of his bankruptcy, to prove under his commission.

And after he has been obliged to pay the bills or notes negotiated by the other, his right of action or of proof does not arise upon the bills or notes, but in respect of the money paid to the use of the other.

But where a banker, from time to time, advanced money, and accepted and discounted bills for a customer, and, in return, the latter remitted bills drawn by him and accepted by others, and afterwards became bankrupt; Lord Eldon permitted the banker, though his acceptances were not then due, to prove the bills so remitted under a commission issued against the customer. (45)

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far the greater part against the estate of the Brownes also; but to a large amount, viz. 80,000*l.*, the Brownes had deposited bills as a security for the payment of a much smaller sum, so that the proof against them in respect of those bills was only for the sum really due, whereas against Caldwell and Co. the proof was for the whole sum payable on the bills; and the consequence of this, and of the unequal negotiation of each other's bills, was, that a much larger sum was proved against Caldwell and Co. in respect to bills negotiated by the Brownes, than against the latter in respect of bills negotiated by the former. Caldwell and Co., on petition, claimed the right to prove the bills which still remained in their hands, for the purpose of covering the damage that their estate would sustain by paying dividends on the bills which had been negotiated by the Brownes, and also to prove the amount of the dividends they had paid on the excess of their liability, in order to be reimbursed the difference. But Lord Loughborough said, "Till Caldwell and Co. pay all the creditors of Browne, who are likewise creditors of theirs, 20*s.* in the pound, they would be, by proving, sharing with the creditors of Browne, who are likewise creditors of theirs. If I allow this petition, I must do two things that are quite impossible. I must hold that the bankruptcy creates a debt which did not exist antecedently; and I must hold that the same debt may be proved twice." He held, therefore, that, in taking the accounts between the two estates, the bills dishonored were to be excluded, and the proof confined to the balance on the cash account only. This abstract is taken not only from Mr. Vesey's but also Mr. Cook's report of this case. Cooke, B. L. 162. See also ex parte Earle, 5 Ves. 833.

(45) Ex parte Bloxham, 8 Ves. 531. (1803.) The bankrupt kept an account with the Bloxhams as his bankers; in the course of which they advanced money, and accepted and discounted bills for him; and he, from time to time, remitted bills to them drawn by him and accepted by others; these remittances were made previously to the bankrupt-

Where there had been reciprocal accommodation between two houses, both of which became bankrupt, Lord Loughborough held, that such of the bills negotiated by either house as were eventually dishonored were, in taking the accounts between the two houses, to be totally disregarded; and that the balance of the cash account (in which account bills eventually honored were to be included as cash) should be proved. (46)

In a subsequent case (but prior to 49 Geo. 3. c. 121.) where the creditor upon the cash account had negotiated bills received from the debtor, to an amount exceeding the cash balance, and both parties became bankrupt, Lord Eldon allowed the cash balance to be proved, (47) but withheld the dividend until the estate of the debtor on the cash account should be discharged from liability in respect of the bills.

It has been objected, that in both these cases double proof was allowed. (48) In a subsequent case, Leach, V. C. held that the bills, negotiated by the creditor on the cash account, represented the cash balance, or so much thereof as they equalled in amount; and that, after proof of the bills, the

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cy, some before and some after the acceptances of the bankers. At the date of the commission the bankers were under acceptances, and they held bills so remitted; neither the acceptances nor the bills being due. On petition, Lord Eldon observing that, "in ex parte Maydwell, Cooke, B. L. 157., Lord Thurlow held that the liability by the acceptance was a good consideration for a promissory note, and permitted the proof," ordered that the bankers should be permitted to prove the bills upon which the bankrupt's name appeared, to cover their acceptances. See also Bosanquet v. Dudman, post.

But, in ex parte Maydwell the party who was allowed to prove had taken up his own acceptance.

(46) Ex parte Walker, antè, p. 465.

(47) Ex parte Metcalfe, 11 Ves. 404. (1805.) Palmer had received from Williamson, in cash and bills, 6424*l.* 9*s.* 3*d.*, and Williamson had received from Palmer, in cash, 5824*l.* 19*s.* 7*d.* Both became bankrupt. Palmer had negotiated the bills; some of which, to the amount of 1098*l.*, were dishonored by the drawee; and Palmer's assignees contended that the amount of these bills should be deducted from the 6424*l.* 9*s.* 3*d.*, which would reduce the sum received by him to 5326*l.* 9*s.* 3*d.*, making a balance of 498*l.* 10*s.* 4*d.* in his favor, which balance they contended they were entitled to prove against Williamson's estate. On petition to prevent such proof, Lord Eldon C. ordered that the proof of the 498*l.* 10*s.* 4*d.* should be allowed; but that Williamson's assignees should retain the dividends upon such proof, in order to exonerate that estate from any demand which might be made in respect of the bills, which should have been taken up by Palmer.

(48) 2 Christ. B. L. 388 et seq. 393 et seq.

cash balance represented by such bills could not be proved (49); for, if it were, there would be double proof.

If a man who for accommodation of the drawer has endorsed an accepted bill be compelled to take it up, he may sue

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(49) Ex parte Read, 1 Glyn & Ja. 224. (1822.) Read accepted, for the accommodation of Lynn, bills to the amount of 6444*l.*, and guaranteed debts of Lynn to the amount of 773*l.*; and Lynn gave Read a note for 1603*l.* for a particular debt due from Lynn to Read, and three bills for 1000*l.* each, drawn by Lynn upon Stalker; which note and three bills Read negotiated, and they were dishonored. Lynn negotiated Read's acceptance, and became bankrupt, being indebted to Read, on the balance of the cash account, in the sum of 3576*l.*, including the 1603*l.* for which the note was given. Read's acceptances, and Lynn's debts, and Lynn's note, and two of the bills drawn on Stalker, were proved under the commission. Read, being insolvent, compounded with his creditors, and accordingly paid the holders of his acceptances, and the parties whose debts he had guaranteed, nearly 1900*l.* He then petitioned that the unpaid bills and liabilities should be excluded from both sides of the account between him and the bankrupt; and that he might prove the cash balance, and the difference between the dividend paid by the bankrupt's estate upon the bills and note negotiated by Read (on which, putting the cash account out of the question, Read was primarily liable,) and the composition paid by Read on his acceptances, and the bankrupt's debts (on which the bankrupt was primarily liable); and it was contended that the case was within the principle of ex parte Walker and ex parte Earle, (antè, p. 465.) or, if not, then that upon the principle of ex parte Metcalfe, (antè, p. 467.) the petitioner was entitled to prove the cash balance, the dividend being retained to meet what should be overpaid by the bankrupt's estate on the bills and note negotiated by Read; or to prove the cash balance, upon an undertaking to indemnify the bankrupt's estate.

Leach V. C. said, "It is not necessary to refer to ex parte Walker and ex parte Earle, inasmuch as the act of 49 Geo. 3. has introduced a new principle, by which cases of this sort must now be tried. By that act, a surety paying after the bankruptcy of the principal, can only prove against the estate of the bankrupt where the creditor has not proved, or stand in the place of the creditor on the bankrupt's estate, where the creditor has proved; and there cannot be double proof. Try the case of the accommodation bills by this principle: Read accepts, for the accommodation of the bankrupt, bills to the amount of 6444*l.*, which remain wholly unpaid at the time of the bankruptcy. These bills are all proved by the holders; and if Read were now to pay these bills, it would form no ground of further proof; all that Read could claim would be, to have the benefit of the proofs already made upon these bills against the estate. With respect to the cash balance, part of it is represented by the promissory note of 1603*l.*; and the residue is more than covered by Stalker's bills, which, as well as the note, have been proved against the bankrupt's estate, by the holders with whom the petitioner negotiated them, and the debts guaranteed by the petitioner have also been proved." Petition dismissed.

See ex parte Maskelyn, 1 Cox, 394.

the acceptor (50), or, in the event of the acceptor's bankruptcy, may prove (51) the bill under the commission, although the acceptance were given for accommodation.

But, if a stranger take up, and pay, for the honor of the drawer, a bill accepted and dishonored by the acceptor, he has no right against the acceptor, if the acceptance were given for accommodation. (52)

Where a bill is drawn upon A. *on account of* B., and A. accepts it on B.'s account, he stands in the situation in which B. would have stood had B. been drawee and acceptor.

Therefore, if A. had no effects of the drawer, yet if B. had, the drawer may prove the bill under a commission of bankrupt issued against the acceptor (53);

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(50) Houle v. Baxter, 3 East's Rep. 177. The defendant, a retail silversmith, ordered goods of Capper, a working silversmith, and to enable him to obtain silver for the order, accepted a bill drawn on him by Capper; and to increase the credit of the bill, Capper prevailed on the plaintiff to lend his endorsement. Capper then passed the bill to Abud, who supplied the silver for the goods, which were made and delivered to the defendant. On the 7th of November, 1796, the defendant became bankrupt, and afterwards obtained his certificate. On the 24th of December, 1796, the day before the bill became due, the plaintiff took it up from Abud, and now sued the defendant as acceptor. A verdict was found for the plaintiff, subject to the opinion of the Court. And Grose J., who delivered the opinion of the Court, said, "here the plaintiff never became surety to the *defendant*; his demand arises solely on the bill, and there was nothing to prevent his proving it under the commission. The bankruptcy and certificate is therefore a bar." Nonsuit entered.

(51) Ex parte Brymer, Co. B. L. 165. (1788.) Three bills, drawn and accepted for accommodation of Scott and Pearson, were endorsed for their accommodation by Span, who got them discounted, and remitted the money to them. Before the bills became due, Scott and the acceptor became bankrupt. Span was afterwards compelled to take up the bills, and was admitted to prove them under the acceptor's commission; and on a petition to have that proof expunged, Lord Thurlow said, "the debt accrued by the acceptance, and Span became the holder in a fair way." Petition dismissed; and on a petition for a rehearing, Lord Thurlow continued of the same opinion.

(52) Ex parte Lambert, 13 Ves. 179. Contrà ex parte Wackerbarth, 5 Ves. 574.

(53) Ex parte Matthews, infrà.

Ex parte Marshall and others, 1 Atk. 131. Watkin having dealings with Garway, and Garway with Hatton, it was agreed between the two latter that Hatton should answer such bills as Watkin should draw on him on Garway's account. Watkin drew accordingly on Hatton for 4000*l.* having effects in Garway's hands beyond that amount. Hat-

So if a bill be drawn on account of A., A. may be entitled to stand in the place of the drawer. Therefore if a creditor of A. draw by A.'s desire upon a debtor of A., and the drawee accept the bill on account of A., and become bankrupt, the drawer may prove the bill under the acceptor's commission, and if A. take up the bill he is entitled to the benefit of such proof. (54)

If an acceptance or endorsement for the accommodation of a trader be given before, and renewed after, he has committed an act of bankruptcy, such renewal is a continuation of the same suretyship; and therefore if a commission of bankruptcy be issued against him, and the acceptor or endorser afterwards pay the bill, he (55) will be entitled to prove the amount un-

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ton accepted the bill, though he had no effects either of Garway or Watkin in hand; he afterwards refused payment, and Watkin was obliged to pay the bill, and proved it under a commission of bankruptcy issued against Hatton. Hatton's assignees petitioned to have the debt expunged, but the Chancellor held that Watkin was entitled to prove, because of his having had effects in Garway's hands beyond the amount of the bill. Petition dismissed.

(54) Ex parte Matthews, 6 Ves. 285. Matthews being indebted to Garland and Co., directed Caldwell and Co., his bankers, to give an order to Burton, Forbes and Gregory (on whom they drew), to accept a bill to be drawn by Garland and Co. for the amount of their debt. The bill was drawn by direction of Matthews and accepted accordingly. Before it became due Caldwell and Co., and Burton, Forbes and Gregory became bankrupt. Garland and Co. proved the bill under the acceptor's commission, but afterwards received the whole amount of the bill from Matthews; on which the proof was expunged; and on petition that it might be restored for Matthews' benefit, it appearing that Matthews had effects in the hands of Caldwell and Co. beyond the amount of the bill, and that he had given them credit for that amount, the proof was ordered to be reinstated.

(55) Stedman v. Martinnant, 13 East's Rep. 127, and vide S. C. 12 East's Rep. 664. On 5th of January, 1807, the plaintiff accepted a bill for the accommodation of the defendant, the drawer, which became due on the 19th of March, when it was dishonored. On the 18th of March, 1807, a docket was struck against the defendant, and on the 21st a commission of bankrupt was issued, which was superseded on the 15th of April. A meeting of the defendant's creditors was then held, when time was given him to pay his debts by instalments. On the 9th of June, 1807, the plaintiff accepted a second bill for the defendant, in order to take up the former one, for the same sum with the addition of interest and stamp: and the endorsement of a third person was lent as an additional security, which was required by the holders of the former bill. On the 6th of August, 1807, a valid

der such commission; though before the renewal of the acceptance, he had notice of such act of bankruptcy having been committed.

Nor will the case be varied in principle, by the circumstance of the holder of the first bill having, before the renewal, given time to the person for whose accommodation the acceptance or endorsement was lent; nor by that of an additional name, as that of an endorser, having been lent upon the second bill.

If more than one of the persons liable on account of the non-acceptance or non-payment of a bill or note become bankrupt, the holder may prove, under the separate commission of each, the full (56) amount of the money due to him upon the

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commission was issued against the defendant, founded on an act of bankruptcy committed in the preceding March. The second bill became due on the 12th of September, 1807, when the plaintiff paid it. The first dividend under the commission was declared and made on the 6th of August, 1808. On the 4th of September, 1809, the defendant obtained his certificate. In an action for money paid, the bankruptcy and certificate being pleaded, a verdict was found for the plaintiff, subject to the opinion of the Court, as to whether the certificate was a discharge. The Court (Le Blanc J. absente) held that the second acceptance was a continuation of the same suretyship, which was created by the first; and that as such suretyship commenced before any act of bankruptcy committed, and, consequently, before the plaintiff could have any notice of such act, the plaintiff might, by 49 Geo. 3. c. 121. s. 8., have proved his demand under the commission, and therefore the certificate was a bar. Postea to the defendant.

(56) Ex parte Wildman, 1 Atk. 109. 2 Ves. 113. Wildman held bills drawn by Buckle and accepted by Vanhylik: Vanhylik failed, and made a composition with his creditors, and Buckle became bankrupt. Wildman, having received nothing under Vanhylik's composition, proved his whole debt under Buckle's commission; but before any dividend was made he received 2*s.* 6*d.* in the pound out of Vanhylik's estate. Buckle's assignees then contended that he ought to deduct the 2*s.* 6*d.* in the pound out of his proof, and take a dividend upon the balance only: but Lord Hardwicke held, that as the whole sum was due when he proved his debt, and the dividend and composition would not amount to 20*s.* in the pound upon his debt, he was entitled to a dividend upon his whole debt; and per Lord Hardwicke, "In cases of bills or notes, where there is a drawer, and perhaps several endorsers, suppose two of these persons become bankrupts, the holder may prove his *whole debt* under each commission, and is entitled to receive satisfaction out of both estates, according to the dividends to be made, until he has received satisfaction for his whole debt: for he has a double security, and it is neither law nor equity to take it from him. But, if before the bankruptcy of one he had received payment of part from the

bill or note at the time he makes his proof, and receive dividends under each upon the sums proved, until he shall in the whole have received such amount.

But after the (57) receipt, (or even the declaration), (58)

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other, he could only have proved the residue under the latter bankruptcy, as the form of proving his debt shows, because no more would remain due to him." To the same effect are the cases of ex parte Royd and ex parte Bennett, cited 2 Ves. 114.

And see Cooke's Bankrupt Laws, 170.

(57) See ex parte Wildman, antè, p. 471.

Cooper v. Pepys, 1 Atk. 106. The holders of notes drawn by Reeves, and payable to Andree, accepted 6*s.* in the pound from Andree; and Reeves having become bankrupt, the question was, whether they might prove the whole debt under his commission? and Lord Hardwicke held they could not, but that the 6*s.* in the pound must go in discharge of so much of the debt, and they could only prove the remaining 14*s.* The same point was ruled in ex parte Ryswick, 2 P. Williams, 89. and ex parte Lefebvre, 2 P. Williams, 409.

Ex parte the Royal Bank of Scotland in re Stein and Co. 2 Rose, 197. (February, 1815.) The Royal Bank of Scotland held bills of Stein and Co., accepted by Kensington and Co., to the amount of 58,000*l.* Kensington and Co. became bankrupts, and the Scotch Bank proved under the commission to the extent of 40,000*l.* January, 1813, a commission having issued against Stein and Co., they entered a claim for the 58,000*l.*, but they had not then an affidavit of the debt. Feb. 6th, an affidavit of the debt was made; Feb. 13th, a dividend of 6*s.* in the pound was declared under Kensington's commission, and that dividend was, without the knowledge of the Scotch Bank, paid to their agent; March 27th, (the first meeting after February 6th,) the Scotch Bank claimed to prove the 58,000*l.* under Stein & Co.'s commission. The assignees insisted they should deduct the dividend paid under Kensington's commission, and the commissioners thought them bound so to do. On petition, Lord Eldon C., though reluctantly, thought the commissioners right. The only cases to the contrary were in Gibson and Johnson's bankruptcy, where the claim was improperly rejected, and the proof was allowed, according to what was the right at the time of the claim.

See Cooke's Bankrupt Laws, 170.

(58) Ex parte Leers, 6 Ves. 644. Leers was holder of a bill which had been drawn upon, and accepted by, persons at Hambro', and endorsed by the payees to Pierre de Ruesnas at Hambro', and by him to Leers. It was protested for non-payment. A commission issued against the payees, and the acceptors and last endorser were also made bankrupts. Leers had the amount of the bill claimed against the estates of each of the last mentioned parties, according to the due course at Hambro', and a dividend was declared of each estate. He had not received any part of either of these dividends; and the question was whether he might prove the whole bill against the estate of the payees? Lord Eldon, after hearing that the practice (the principle of which he doubted) was against such proof, ordered that these dividends should be deducted.

of a dividend under one commission, he cannot prove under any of the rest more than the sum remaining due after deducting such dividend.

Unless he offered to prove before any such dividend, and his claim were improperly disallowed; for, then his right will stand as it was when the claim was made. (59).

But making a claim, if it be not sufficiently supported at the time, will be of no avail. (59)

Where property of a bankrupt is holden by a creditor as a security for his debt, it will either be sold, the proceeds deducted from the debt, and proof made for the residue: (60) Or, if the creditor insist upon proving his whole debt, he must give up the security for the benefit of the creditors at large. (61)

Where a bill or note, endorsed by the bankrupt, is given by him to his creditor, primâ facie the property is in the creditor; the endorsement is evidence that the bill or note was given not as a security, but as payment. (62)

But this circumstance is not conclusive. (63)

The endorsement might have been made merely to enable the creditor to obtain payment from the other parties without giving him any demand upon the bill or note against the endorser. (64)

In such case the bill, though endorsed by the bankrupt, will be sold (65); or delivered up for the benefit of the creditors at large.

So, where a debtor executes a mortgage to his creditor for

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(59) See ex parte the Royal Bank of Scotland, antè, p. 473.
(60) 19 Ves. 231.
(61) Ex parte Grove, 1 Atk. 105.
(62) 19 Ves. 231. Ex parte Rufford, infrà.
(63) 19 Ves. 231. Ex parte Baldwin.
(64) 19 Ves. 231, 232, 233.
(65) Ex parte Baldwin, cit. 19 Ves. 230. And see n. (73.)
When a bill is so sold, the vendee will not be allowed to prove against the bankrupt; for, an endorsee, who became such after a commission issued against a party to the bill, can prove under such commission no more than the holder of the bill at the time of the bankruptcy could have proved thereon (ex parte Deey, 2 Cox, 423.); in this case the holder at the time of the bankruptcy could have proved nothing upon the bill.

securing the debt, and remits him bills, some with, and others without the debtor's endorsement thereon; the inference is that the bills endorsed are remitted as securities. (66)

So, if a bill be endorsed and remitted by the endorser for the purpose of enabling the remittee to raise money thereon, the property in such bill is not, as between the parties, transferred by such endorsement: such bill in the hands of the remittee will be a security for any debt due to him from the endorser. (67)

If it do not appear that the bill was given as a security, the proof should be made on the bill, not on the debt; for, of the debt, it is considered as payment pro tanto. (68)

It seems, however, to be of frequent occurrence under these circumstances, to prove the debt and exhibit the bills as securities. (68) (69) (70)

But such informality will not be allowed to prejudice the rights of the other creditors.

Where, therefore, under these circumstances, the debt is proved, and bills exhibited as securities, if the amount of one or more of the bills be wholly paid, either by other parties (68) (70), or partly by other parties and partly by the estate of the bankrupt (69); such amount will be deducted from the proof so that dividends will be paid on the residue only.

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(66) Ex parte Baldwin, 19 Ves. 231, 232. Lord Eldon appears to have concurred with the decision in ex parte Baldwin, supposing it to have been such as is mentioned, 19 Ves. 231: but, according to Mont. New Decisions in Bankruptcy, 68. n. all the bills were endorsed by the bankrupt.

(67) 19 Ves. 232.

(68) Ex parte Twogood, post, p. 475.

(69) Ex parte Rufford, 1 Glyn & Ja. 41. Hancocks and Knight proved a debt of 1517*l.* 2*s.* 2*d.* under a commission against George and Thomas Wood, exhibiting as securities two promissory notes, and a bill for 600*l.* drawn by the bankrupts, payable to their own order, and endorsed by them to Hancocks and Knight. The acceptor of that bill afterwards became bankrupt, and Hancocks and Knight proved the bill, and received 15*s.* in the pound under his commission. They also received under Wood's commission 5*s.* in the pound on the whole of their proof. On petition by Wood's assignees to have the proof of the debt reduced by expunging the proof of the 600*l.* on which Hancocks and Knight had received 20*s.* in the pound, Leach V. C. said, "the proof ought not to be expunged; but, considering that the bill having the bankrupt's name upon it could not be sold as a general security for

And where the bill is paid partly by other parties and partly by the estate of the bankrupt, whatever the creditor may afterwards receive upon it from the other parties he will receive in trust for the assignees. (70)

So, on the other hand, where a bill deposited is not sold, but the whole debt is proved and the bill exhibited as a security, such informality will not be allowed to prejudice the rights of the other creditors; and, therefore, whatever sums are from time to time received from other parties to the bill will be deducted from the proof, and the dividends paid on the residue only; although the bill be not then wholly satisfied. (73)

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the whole debt, it must be taken as in payment of the particular sum of 600*l.*, and Hancocks and Knight must be restrained from receiving further dividends on that sum." Ordered accordingly.

(70) Ex parte Burn, 2 Rose, 55. Aspinwall proved a debt of 2772*l.* 7*s.* 9*d.* under a commission against Moulson, exhibiting as security four bills endorsed by Moulson, and amounting together to 2881*l.* 7*s.* When the first dividend was declared, Aspinwall had received the full amount of one of the bills from the acceptor, and dividends to the amount of 18*s.* 6*d.* in the pound from the estates of two of the parties to another of the bills. Moulson's first dividend was 4*s.* in the pound. Aspinwall petitioned for payment of a dividend on the residue of his proofs, deducting only the amount of the bill which had been paid in full; which was ordered. Whereupon the assignees petitioned that Aspinwall might be restrained from proceeding under that order, that the proof might be expunged; or that, upon payment of the residue of the bill on which dividends had been received from other parties, the proof might be reduced to the sum which would then remain due, and that the assignees might have the benefit of Aspinwall's proofs against the other parties to that bill. Lord Eldon appears to have held, that if the assignees paid the residue of the bill on which Aspinwall had received dividends from the other parties, he would be a trustee for them in respect of any further sum which he might receive from the other parties to that bill; and if Aspinwall had received the dividends under the former order, there was no doubt the Court had authority to recall them.

(73) Ex parte Twogood, 19 Ves. 229. Richard and Edward Lee proved a debt of 8007*l.* under a commission against Crossley, exhibiting as securities bills they had received from Crossley, endorsed by him, for 7999*l.* Before any dividend, they received from other parties the amount of two of the bills; which amount they deducted when the first dividend was declared. They afterwards received the full amount of three, and dividends from the estate of other parties to, others of the bills; and also three dividends from the estate of Crossley. Crossley's assignees petitioned that the proof might be reduced to the sum remaining due, after deducting what had actually been received in respect of the bills; and that they might retain the amount of the divi-

If a bill or note be holden by a creditor as a collateral security for the payment of a debt less in amount than the bill or note, he may prove the full amount of such bill or note against all the parties liable thereon, except the debtor (74); but he must not receive more than the actual debt.

Against the debtor he can prove no more than the actual debt. (71)

Where a bill is holden by a creditor as a collateral security

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dends overpaid; contending that the bills were deposited in the nature of a pledge, and that they ought, therefore, to have been sold, and the produce deducted, and proof made for the residue. The Lees admitted that such of the bills as had been paid in full must be deducted from the proof; but they contended that, upon the residue of the proof, they were entitled to receive dividends till 20*s.* in the pound should be paid. Lord Eldon C. said, "The question is, whether the bills were or were not deposited as securities. Where property of a bankrupt is deposited as a security, it must be sold, and the produce deducted, and proof made for the residue; but, these bills being endorsed by the bankrupt, are primâ facie the property of the Lees, and the proof should have been upon the bills. The endorsement is primâ facie evidence that the bills were not given as a security, and it is for the assignees to prove that the object was security." Afterwards, Lord Eldon being satisfied, from affidavits on the part of the Lees, that the bills were not given as a security, dismissed the petition.

(74) Ex parte King, Cooke's B. L. 156. Davies gave his note for 500*l.* to Turner and Toye, expressed to be for value received, but, in fact, for their accommodation, and they being indebted to King in 300*l.* endorsed this note to him, to enable him to raise that sum. Turner and Toye, and Davies afterwards became bankrupt: and on petition, King was allowed to prove the whole amount against Davies's estate, and to receive dividends not exceeding 300*l.*

Ex parte Crossley, Cooke's B. L. 157. 3 Bro. Ch. Cas. 237. Hartley being indebted to Crossley in 147*l.* 10*s.* gave him a bill for 200*l.* which had been drawn on Livesay and Co. by a partner in that house, payable to Hartley's order. The bill was accepted, but afterwards dishonored. Livesay and Co. became bankrupts; but before a commission issued, Hartley paid Crossley 101*l.* 10*s.* in part of his debt. It appearing that Livesay and Co. had lent this bill to Hartley, the commissioners refused to allow Crossley to prove under Livesay's commission more than the balance of 46*l.* remaining due to him from Hartley. But, on petition, the Chancellor ordered the proof to be admitted for the whole 200*l.*, and dividends to be received until the petitioner should be satisfied the 46*l.* Ex parte King was relied on.

See also ex parte Bloxham, 6 Ves. 449., in which Lord Eldon C. said, "I looked upon it as settled that you cannot hold the paper of the bankrupt, and prove beyond your actual debt upon it; but that you may have the paper of third persons, those persons being indebted to your debtor in more, and you may prove to the whole amount; not exceeding 20*s.* in the pound upon the original debt."

(71) Vide ex parte Bloxham, suprà, and Cooke's B. L. p. 156.

for a debt payable with interest, he may receive, under commissions against other parties than the debtor, dividends to the amount, not only of the debt, but of the interest up to the time of full payment of the debt. (72)

The creditor may prove the full amount of the bill against a party, who merely lent his name for the debtor's accommodation. (73)

If, upon a purchase of goods, a guarantee for the buyer deliver to the seller, as security for the payment of the purchase money, a bill or note on which such guarantee is liable, the seller will not be entitled to prove under a commission against the guarantee to a greater amount than he can prove against the purchaser, viz. the sum remaining due for the goods: for, the contract being immediate between the seller and the guarantee, the latter will be considered as standing in the same situation as the purchaser, and entitled to the benefit of all payments by which the debt has been reduced. (74)

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(72) Ex parte Martin, 2 Rose, 87. (1814.) Martin proved, under a commission against Sharpe and Sons, a debt of 56*l.* 4*s.* 8*d.* for which he held, amongst other securities, a bill for 2450*l.* accepted for Sharpe and Sons' accommodation. He afterwards proved that bill under a commission against the acceptors. On the 12th of March 1814, when the first dividend under the acceptors' commission was declared, the principal of the debt from Sharpe and Sons to Martin was reduced to 14*l.* 4*s.* and Martin was paid a dividend on the proof of the bill to that amount; but he claimed to receive dividends to the further amount of 86*l.* for interest up to that day; and on petition for payment of such interest, he insisted that he was entitled to interest up to the day of the dividend, until which time the debt was unliquidated; that the bill had been deposited as a security for principal and interest, and he was entitled to avail himself of it for his full and complete indemnity. The assignees of the acceptors contended that interest could not be allowed further than up to the date of the commission against Sharpe and Sons, or, at the most, up to the date of the commission against the acceptors. Lord Eldon made an order for the payment of the interest up to the day of the dividend, but offered, as it was a new case, to rehear the petition: whether he did so or not does not appear.

(73) Vide ex parte King, and ex parte Crossley, antè, p. 476. n. 70. See also Cooke's B. L. 5th ed. p. 156.

(74) Ex parte Reader in re Willatts, (1819.) Buck. 381. Kearns was about to buy goods of Reader, but Reader required some person to become security for the price. Willats consented, and Reader supplied goods to the amount of 208*l.* and Willatts became a party to bills to that amount. Willatts afterwards agreed with Reader to become security for more goods. Goods to the amount of 409*l.* were supplied, and Willatts became party to other bills to that amount. Further goods

A person holding a joint and several security for the same debt may treat it either as a joint or a several security, but not as both: he is bound to elect. (75)

Therefore, if two or more partners make a joint and several promissory note, the holder may prove, under a commission against them, either against their joint estate or against the separate estates of each; but he cannot prove against both.

If two of the members of a firm of five carry on a distinct trade in partnership, and accept a bill drawn upon them by the firm of five (76); or if the firm of five accept a bill drawn upon them by the firm of two (77); the holder will be entitled to prove against the estates of both firms, if he took the bill without notice of the connexion between the parties.

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were supplied, and Willatts became party to other bills. Willatts became bankrupt, and Reader held in his hands of the bills so given by Willatts the amount of 614*l.* The debt from Kearns to Reader was reduced to 393*l.*, and whether Reader should prove for that sum or for the 614*l.* was the question. The commissioners thought him entitled to prove for the 393*l.* only, and, on petition, Leach V. C. thought them right. "If Willats, at the request of Kearns, and without any communication with Reader, had put his name to the bills and delivered them to Kearns, and Kearns had delivered them to Reader as a security, Reader would have been entitled to prove the full amount, and to receive dividends till his debt was paid; but, as the transaction here was immediately between Reader and Willatts, it was the same as if Willatts had been the purchaser of the goods, and then the proof against his estate could not exceed what remained due for the goods." Petition dismissed.

(75) 2 Glynn & Ja. 5, 6.

(76) Ex parte Adam, in re Cooke, (Aug. 1813.) 2 Rose, 36. Five persons traded under the firm of Cooke and Co., and two of them under that of Harrison and Goss. Cooke and Co. drew a bill upon Harrison and Goss, which they accepted; and Adams, having taken it without any knowledge of any connexion between the houses, and both houses having become bankrupt, he insisted that he had a right to prove it against both estates: Lord Eldon C. was of that opinion, and ordered accordingly.

(77) Ex parte La Forest, (April, 1797.) Co B. L. 251. 5th ed. Whincup, Griffin, Corson, and Gordon carried on the business of soap makers, under the firm of Whincup and Griffin, at Brentford; and Corson and Gordon carried on the business of turpentine manufacturers, in partnership, also at Brentford. Petitioners discounted for Corson and Gordon a bill, drawn by Corson and Gordon upon and accepted by "Whincup and Griffin, soap manufacturers, Old Brentford." Lord Loughborough ordered, that if the petitioners knew that Corson and Gordon were concerned with Whincup and Griffin in one partnership, carried on under the firm of Whincup and Griffin, they should be at liberty to apply to the court for further directions; but if they did not know of such partnership, they were to be admitted to prove against the respective joint estates of both firms. See 2 Glyn & Ja. 6.

But where a single individual is liable upon a bill or note in several characters, viz. as an individual and as a member of a firm, the holder will not be allowed to prove against the joint estate and also against the separate estate of such individual (78); although the individual were a distinct trader, and the holder, when he took the bill or note, was ignorant of the connexion between the parties:

A fortiori, where the holder was aware of the connexion between the parties (79), and the individual was not a distinct trader. (80)

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(78) This is stated only upon conjecture from the two following cases.

Ex parte Liddell in re Prado, 2 Rose, 34. Keys sold goods to Groves and Co., to be paid for by an approved acceptance. They gave him a bill upon De Prado, which De Prado accepted. The house of Groves and Co. consisted of Groves (an infant), Hitchcock, and De Prado; but Keys, when he took the bill, did not know that De Prado belonged to that house. Separate commissions were taken out against Hitchcock and De Prado; orders were made under each to keep separate accounts of the joint and separate estates, and to have the joint property distributed amongst the joint creditors. Keys proved under each commission as a joint creditor for goods sold, and received a dividend under each out of the joint effects. He then offered to prove upon De Prado's acceptance as a separate creditor, to get a dividend upon his separate estate, and the commissioners admitted him. But, upon petition to expunge this proof, Lord Eldon C. held it ought to be expunged: he discovered that De Prado was a partner; and then he might charge him as a partner in respect of the goods, or as an individual in respect of the bill, but not as both, and he had made his election to charge him as a partner in respect of the goods.

Ex parte Husbands, 2 Glyn & Ja. 4. (1825.) Isaac and Peter Blackburn carried on business at Liverpool, in the name of Isaac Blackburn only, and Peter carried on a separate business in London. Petitioner was holder of a bill drawn by Isaac upon, and accepted by Peter. The bill was drawn and negotiated for the purposes of the partnership; but petitioner was not, when he took the bill, aware of the existence of the partnership. He afterwards discovered the fact, and a commission having issued against the Blackburns, he proved against the joint estate, and voted in the choice of assignees. He afterwards petitioned for leave to prove against the separate estate of Peter; or, at least, to have the proof transferred from the joint estate to the separate estates of Isaac and Peter. At the hearing he abandoned his claim to double proof. Leach V. C. held, that the petitioner had elected, and was concluded by such election. But, on appeal, Lord Eldon C. held he was not concluded, and ordered that the petitioner should be at liberty to withdraw the proof against the joint estate, and to prove against the separate estates.

(79) Ex parte Bigg in re Harrison, (February, 1814.) 2 Rose, 37. Cooke drew a bill upon Harrison & Co., which they accepted. Cooke

And it will make no difference that the holder, before he took the bill or note, required the endorsement of the individual, and thereby raised a bargain for a double security. (81)

In such case the holder may elect, whether he will prove against the joint estate or against the separate estates of the members of the firm. (82)

And though he may have proved against the joint estate and voted in the choice of assignees, he may be allowed to withdraw that proof, and prove against the separate estates. (83)

Where several distinct traders or houses of trade are concerned in a joint adventure, and for a demand, for which all are liable, one of the traders or houses gives a bill upon another of them, the payee may make separate proofs upon the bill against each of the parties to it, if separate commissions issue against them: although he knew they were jointly concerned and jointly liable. (84)

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was a member of that house; and Biggs, when he took the bill, knew it. The house having become bankrupt, Bigg proved against the joint estate, and he now petitioned to be admitted to prove against the separate estate of Cooke. Lord Eldon C. thought him not entitled, and the petition was dismissed.

Ex parte Bank of England in re Graves, 2 Rose, 82. Graves, Sharp, and Fisher, endorsed a bill to Fisher, a distinct trader, that he might get it discounted with the bank. The bank knew that Fisher was a member in the house of Graves and Co.; they discounted the bill, but made Fisher endorse it. A commission having issued against the house, the bank insisted they had a double security, and claimed to prove against the joint estate of Graves and Co., and against the separate estate of Fisher. Lord Eldon C. held them not entitled. "In all the cases where the holder was so entitled, there had either been an ignorance of the union of the parties in one partnership, or a subdivision of them into distinct trading establishments. As to Fisher's being a distinct trader, that would only give right against his separate estate, which a creditor cannot do in bankruptcy if he resort to the joint estate. The bank must elect."

(80) Ex parte Bigg, suprà.

(81) Ex parte Bank of England, suprà.

(82) Ex parte Liddell, antè, p. 479, n. (78). Ex parte Husbands, antè, p. 479, n. (78).

(83) Ex parte Husbands, antè, p. 479, n. (78).

(84) Ex parte Walker, and ex parte Wenslay in re Ford. (August, 1813.) 1 Rose, 441. Ford, a ropemaker, Price and Cross, ship brokers, and Gilbert, were jointly interested in the cargo of a ship, and jointly indebted to Wenslay and Co. in respect thereof. Wenslay and Co. knew they were jointly interested, and Ford drew upon Price and

Under a commission of bankruptcy, the holder of a bill or note is not (85) entitled, (unless the bankrupt's estate should produce a (86) surplus,) to any interest or charges accrued or incurred after the commission issued; and before 6 Geo. 4. c. 16., where the act of bankruptcy to which the commission related was ascertained (87) he was not entitled to any accrued or incurred after that act of bankruptcy.

By 6 Geo. 4. c. 16. s. 57., the holder of a bill or note whereupon interest is not reserved, overdue at the issuing of a commission against any person liable thereon, may prove for

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Cross in their favor, to pay them. Price and Cross became bankrupts, and Wenslay and Co. proved the bill against their estate. Ford afterwards became bankrupt, and Wenslay and Co. proved it against his estate. On petition to expunge the proofs, it was urged in support of it, that this was not the case of one partner drawing upon the firm, but of one house of trade drawing upon another house of trade, and that that gave a double security. Lord Eldon C. assented to the distinction, and ordered the dividends to be paid.

Quære, were there not other circumstances besides those stated: there being no joint-commission, might not Wenslay and Co. have proved against each estate, even in respect of the original debt?

(85) Anon. 1 Atk. 140. The question was, whether the costs and charges incurred by protesting bills after a commission of bankruptcy issued could be proved; and Lord Hardwicke ordered that the costs of the protests arisen before the commission should be proved, but no part of the costs arisen afterwards.

As to re-exchange see ex parte Hoffman, Cooke, B. L. 173. and Francis v. Rucker, Ambl. 672. and as to the latter see 2 Bro. Chan. Ca. 599. It is observable that, in that case, the drawer was (in effect) allowed to prove re-exchange under the acceptor's commission. It has been held, indeed, that the acceptor is not liable for the re-exchange; vide antè, p. 380. Pothier (pl. 117.) expressly says that he is, in like manner as the drawer: and it seems reasonable that he should be liable to all parties where he has effects; and to all, excepting the drawer, where he has not.

(86) Vide ex parte Mills, 2 Ves. 295, and Butcher v. Churchill, 14 Ves. 573.

(87) Ex parte Moore, 5 Bro. Chan. Ca. 597. Previous to the 5th of May, 1785, Mrs. Tyler accepted several bills drawn upon her by Moore, and on that day committed an act of bankruptcy, but no commission issued until the 9th of March, 1786. The bills became due between May, 1785, and March, 1786, and Mrs. Tyler not paying them, Moore did. He also paid 298*l.* for damages and charges, and the interest amounted to 46*l.* 10*s.* The commissioners allowed Moore to prove the sum for which the bills were drawn, but would not let him prove the interest, or the sum paid for damages and charges; upon which, he petitioned the Chancellor: but the Chancellor held, that as the time when the act of bankruptcy was committed was ascertained, he could not carry the damages beyond that time; and the petition was disallowed.

at the time he took the bill for the money he advanced upon it, and when he takes it up he is restored to the state in which he was when he originally received it. (91)

And a bill or note may be the subject of set-off, though it do not (92) become due until after an act of bankruptcy committed. (*b*)

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(91) Bolland and another, assignees of Marsh, Fauntleroy and Co. v. Nash, 8 Barn. & Cr. Pasch. 105. Fauntleroy, who was a partner in the house of Marsh and Co., drew two bills upon Nash for 4000*l.* due 20th October, 1824, and Marsh and Co. discounted them for Nash: Nash accepted them payable at Marsh and Co.'s (who were his bankers); but Marsh and Co. endorsed them to Martin and Co., and became bankrupts September, 1824. Martin and Co. had money of Marsh and Co.'s in their hands, and when the bills became due, paid themselves the amount. Marsh and Co.'s assignees thereupon sued Nash as acceptor, and Nash having had *more money than* 4000*l.* in Marsh and Co.'s hands when they became bankrupts, insisted he had a right of set-off under 5 Geo. 2, on the ground that this was a case of mutual credit. On case it was insisted that Marsh and Co. had no claim against Nash till the bill was paid, which was after their bankruptcy, and that there was no credit from them to Nash till that period,—and ex parte Hale was relied on: but the Court said, it did not appear in ex parte Hale that Hale was the drawer of the bill, or that he took it immediately from the acceptor; (and if not, there might have been intermediate parties from whom he might have enforced payment;) whereas here the transaction was immediate between Marsh and Co. and Nash, and Marsh and Co. trusted Nash with their money upon this bill; and when the bill was taken up out of their funds, Nash was liable to their assignees for the money he had of them as for money had and received. Postea to defendant.

(92) Ex parte Wagstaff, 13 Ves. 65. A commission of bankruptcy issued against the Kershaws on the 29th of June, 1804. At that time Wagstaff was a creditor for 2277*l.* and he had accepted a bill drawn on him by the bankrupts for 399*l.*, which became due and was paid by Wagstaff, on the 5th of July, 1804. He was at the same time debtor to the bankrupt in 363*l.*, the greatest part of which was for goods sold on a credit which did not expire until the 1st of May, 1805: the residue was for money had and received. He claimed to be allowed to prove his debt of 2277*l.*, contending that he had a right to set off the 363*l.* against the 399*l.* on the acceptance, though not due until after the bankruptcy. The commissioners, however, refused to allow the set-off. But Lord Erskine C., on petition, ordered the set-off to be allowed, and said that this was mutual credit to all intents and purposes. See ex parte Prescott, and Atkinson v. Elliott, antè, p. 482, note (88).

[(*b*) A. failing, assigned his property and debts, including a demand against B. B. afterwards purchased a note of A. which was overdue. In an action by A. for the benefit of his assignees against B., it was held that B. could not set off A.'s note, if he had notice of the assignment, and that actual notice need not be proved, but it was sufficient to prevent the allowance of the off-set, that the note was purchased under circumstances sufficient to put him on inquiry. Anderson v. Van Allen, 12 Johns. R. 343.

S. P. Johnson v. Bloodgood, 1 Johns. Cas. 51; S. C. 2 Cain Er. 302. See also Goodwin v. Cunningham, 12 Mass. R. 193.]

CHAP. XI.

Of the Evidence necessary to entitle the Plaintiff to recover upon a Bill or Note.

What must be proved against the Acceptor—Drawer—Maker—Or Endorser.

What Proof is superseded by Offers to give Security.

——————— *by part Payment, or Promise to pay.*

——————— *by asking indulgence.*

Proof of Signature—what sufficient.

——— *Confession by Co-Defendant.*

——— *Payment of similar Bills.*

——— *in case of Signature by Servant—or Partner.*

——— *Presentment.*

Proof of Notice.

——— *on Protest.*

——— *on Judgment by Default.*

Of referring Action on Bill or Note to an Officer of the Court to compute what is due thereon.

To recover in respect of a bill or note upon a count for money lent, money paid, or money had and received, the plaintiff must prove such of those facts (if they are not admitted,) as he ought to state upon a special count; and upon a special count, he must prove such of the facts which are not admitted as appear upon the face of that count necessary to maintain the action.

[But the general rule of law which requires the holder of a bill or note to prove the signatures of the parties to the instrument, in order to enable him to maintain his action; may be modified by a rule of Court, dispensing with such evidence, unless the defendant annex to his plea an affidavit that the instrument was not executed by him. (*a*)

[(*a*) Mills v. Bank of the United States, 11 Wheat. 431.]

In an action against any party to a bill or note the instrument itself must in general be produced. (*b*)

But the plaintiff, in an action on a bill or note which is dated, is not bound to prove the day on which it was issued, or to show at what time he received it. (*c*)]

An acceptance admits the (1) ability of the drawer to make the bill, and if made after sight of the bill, his (2) signature; an endorsement admits the ability and (3) signature of every antecedent party.

[(*b*) As to the cases in which an action may be maintained on a bill lost or destroyed, see Long v. Baillie, antè, p. 414, and other cases p. 415 to 419.

The statutes of Kentucky provide that no person shall be permitted to deny his signature as maker or assignor of a note in a suit against him, unless he will make an affidavit denying the execution or assignment. It was held that this statute did not render the production of the original instrument unnecessary in a suit against the assignor, and that the record of a judgment against the maker of the note, and which contained a copy of it, was not admissible in evidence. Story J. who delivered the opinion of the Court, said, "It would be dangerous to allow that, because proof of the execution of an instrument was dispensed with, therefore no proof of its existence, or of the right of the party to hold it by assignment, was to be required." Sebree v. Dorr, 9 Wheat. R. 558.]

[(*c*) Bayley v. Taber, 6 Mass. R. 451.]

(1) Porthouse v. Parker and others, 1 Campb. N. P. C. 82. This was an action by the payee against the drawers of a bill. The bill purported to have been drawn by Wood as agent of the defendants, upon John Parker, one of the defendants. There was no proof of Wood's authority: but it was proved that the bill had been accepted by the agent of John Parker, the drawee: and Lord Ellenborough held that the bill having been accepted by order of one of the defendants, this was sufficient evidence of its having been regularly drawn.

(2) Wilkinson v. Lutwidge, Str. 648. In an action against the acceptor of a bill, Raymond C. J. allowed the plaintiff to read the bill without proving the drawer's hand; because, he thought the acceptance a sufficient acknowledgment on the part of the defendant; but he said it would not be conclusive; and if the defendant could show the contrary, the reading the bill should not preclude him. See Cooper v. Le Blanc, post, note (31.)

Jenys v. Fawler, Str. 946. In an action against the acceptor of a bill, Raymond C. J. held it was not necessary for the plaintiff to prove the drawer's hand, and on the defendant's offering to call witnesses to swear they believed it was not the drawer's hand, the Chief Justice would not admit the evidence, and he inclined strongly that actual proof of forgery would not excuse the defendant.

See Price v. Neele, ante, p. 323, and Smith v. Mercer, ante, p. 324. [See also Levy v. Bank of the United States, ante, p. 410.]

(3) Lambert v. Pack, Salk. 127. Lord Raym. 443. 12 Mod. 244.

But an acceptance, though made after sight of an endorsement, does not admit the ability or (4) signature of the endorser.

Nor does it admit the endorsement of the drawer where the bill is payable to the drawer's order. (5)

Holt, 117. In an action against the endorser of a bill, Holt C. J. ruled that it was not necessary to prove the drawer's hand; for, though the bill was forged, the endorser would be liable.

Williams v. Seagrove, 2 Barnard. B. R. 82. A rule was made absolute for delivering up a note to an endorsee, though it was proved to have been forged; upon the ground that he might notwithstanding bring actions upon it against the endorsers. See also Str. 442.

Critchlow v. Parry, 2 Campb. N. P. C. 182. Endorsee against the endorser of a bill. The plaintiff was the immediate endorsee of the defendant. The declaration stated several prior endorsements, and the question was, whether it were necessary to prove them. Lord Ellenborough held the proof unnecessary, and the plaintiff had a verdict.

(4) Smith v. Chester, 1 Term Rep. 654. In an action by the endorsee of a bill against the acceptor, the plaintiff was nonsuited because he could not prove the hand-writing of the first endorser, though the endorsement was on the bill at the time of the acceptance. A motion was made to set aside the nonsuit, on the ground that, as the endorsement was on the bill when it was accepted, the acceptance admitted it; but the court thought it did not; because, the acceptor only looks to the hand-writing of the drawer, and *that* he is afterwards precluded from disputing. Rule discharged.

Carvick v. Vickery, Dougl. 630—653. n. (134,) ante, p. 49. note (21.) A bill payable to the order of father and son, who were not partners, was endorsed by the son only, after which it was presented, and the drawee wrote upon it a direction to his banker to pay it. In an action against the drawee the question was, whether the endorsement by the son was sufficient? and Willes J. inclined to think the order to the banker was a recognition of the endorsement; but Ashhurst and Buller Js. thought not. However, in Hankey v. Wilson, Say. 223. in an action by the endorsee of a bill against the acceptor, there was no actual proof of the hand-writing of one of the endorsers, but it appearing that the endorsement was upon the bill when the defendant accepted it, and that he promised to pay it, Ryder C. J. left the case to the jury, who found for the plaintiff; and upon a rule to show cause why there should not be a new trial, the court thought it a question for the jury, Whether the acceptance and promise did not amount to an admission that the name of every endorser was authentic? and refused the rule.

(5) Robinson v. Yarrow, 7 Taunt. 455. Action by endorsee against acceptor on bill importing to be drawn by Henry, per procuration for Stachen and Co., payable to the order of Stachen and Co., and to be endorsed by Henry per procuration for Stachen and Co. Plaintiff proved the acceptance, but he did not prove Henry's signature to the endorsement, nor his authority to endorse, upon which Burrough J. directed a verdict for defendant; and on rule nisi for new trial, and cause shown, the Court held the acceptance admitted Henry's authority to draw, and his signature as drawer, but that it was no ad-

And if such bill import to be drawn and endorsed by procuration, though the acceptance admit the procuration as to the drawing, it does not as to the endorsement. (5)

But upon a bill payable to the drawer's order, an acceptance admits the drawer's ability to endorse; for if he cannot endorse, he was not of ability to draw. (6)

It precludes the acceptor, therefore, from relying upon infancy in such drawer and endorser. (6)

So if a bill be drawn in the name of a firm purporting to consist of several persons, the acceptance admits that there is such a firm (7):

And that it consists of several. (7)

And the acceptor will be precluded from proving the contrary, if it be only to let in a technical objection. (7)

[In an action against the acceptor of a bill drawn in the name of a fictitious person, and payable to the drawer's own order, the acceptor must be considered as undertaking to pay to the order of the person who actually drew the bills; and the plaintiff may bring evidence to show, that the signature of the supposed drawer to the bill and to the first endorsement are both in the same handwriting. (*d*)

Accepting a bill drawn by a person as executor, admits his right to sue in that character. (*e*)]

In an action against the acceptor of a bill or maker of a note,

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mission of his authority to endorse, or of his endorsement; for the drawing and endorsing would have contrary effects, the one would bring the amount to Stachen and Co., the latter would carry it from them: rule discharged.

(6) See Taylor v. Croker, anté, p. 39, n. (3).

(7) Bass v. Clive, 4 M. & S. 13. Endorsee against acceptor on bill purporting to be drawn by Ellis, Needham, jun., and Co., and payable "to our order." Plaintiff declared upon it as drawn by certain persons trading under the firm of Ellis, Needham jun., and Co., and payable to their own order; defendant proved at the trial that only one person constituted that firm, upon which Lord Ellenborough nonsuited, with liberty to plaintiff to move to enter a verdict. On rule nisi indè and cause shown, he and the rest of the Court were clear that by the acceptance defendant had admitted conclusively, that there was such a firm as that stated on the face of the bill, and was not at liberty to prove the contrary: rule absolute.

[(*d*) Cooper v. Meyer, 10 B. & C. 468.]

[(*e*) Aspinall v. Wake, 10 Bing. 51.]

the plaintiff must prove the defendant's signature, and the necessary endorsements; and in the former case, if the acceptance were made without sight of the bill, the signature of the drawer: in an action against the drawer of a bill, or the endorser of a bill or note, he must prove the defendant's signature; the necessary endorsements (8) between the defendant and the plaintiff, the presentment; the non-acceptance or non-payment; the notice of dishonor (or the facts to show such notice unnecessary); and, in the case of a foreign bill, the protest.

In an action, indeed, against the drawer (9) or acceptor of a bill, or the maker of a note, all the endorsements stated, though some may have been stated unnecessarily, must be proved; but against an (10) endorser, the defendant's endorsement, and such endorsements only as are stated to have been made subsequently to his, need be proved.

In proving endorsement by payee, it is not sufficient to prove that a person pretending to be payee endorsed it; there must be some evidence of his being payee. (11)

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(8) Vide Critchlow v. Parry, antè, p. 487, n. (3). [See also Blakely v. Grant, 6 Mass. R. 386; Hunt v. Edwards, 4 Har. & John. 283; M'Cormick v. Trotter, 10 Serg. & Raw. 94.

But in a suit brought by the bearer against the maker of a note payable to A. or bearer, and endorsed by A., it is not necessary to prove A.'s handwriting. Wilbour v. Turner, 5 Pick. 526.]

(9) Waynam v. Bend, 1 Campb. N. P. C. 175. In an action against the maker of a promissory note payable to T. L. or bearer, the declaration averred an endorsement by T. L., and Lord Ellenborough held that the plaintiff, having stated such endorsement, though unnecessarily, was bound to prove it. See also Smith v. Chester, antè, p. 487. n. (4), and Bosanquet v. Anderson, 6 Esp. N. P. C. 43.

(10) See Critchlow v. Parry, antè, p. 487. n. (3).

(11) Bulkeley v. Butler, Hil, 1824, 2 B. & C. 434. In an action by endorsee against acceptor, on bill of 6th August, 1816, at thirty days' sight, payable to Edmund Shanahan or order, dated Lisbon, the bill was produced with an endorsement in the name of Edmund Shanahan; and to prove the endorsement, plaintiff's clerk was called, who proved that on 19th August, 1816, a person calling himself Edmund Shanahan produced the bill to plaintiff at Cadiz, and wrote the endorsement upon it on the 20th; that at the same time on the 19th he produced two other bills, one for 640*l.*, which the clerk knew to be a genuine bill, drawn by M'Donnell and Co. of Lisbon; that this person first called on plaintiff 10th August, and produced a genuine letter of recommendation from M'Donnell and Co., describing the bearer as

His possession of the bill at the time he endorsed it is evidence of his being payee; for if he were not payee, he would have no right to such possession. (11)

But such possession, though admissible in evidence to ground the presumption of his being payee, only furnishes a presumption for the consideration of a jury. (11)

And it may be strengthened, on the one hand (11);

And impeached, on the other. (11)

Possession by the party, at the time he endorses the bill, of a genuine letter of recommendation from a correspondent of the endorsee, giving him the same description as the bill gives the payee, tends to strengthen the presumption. (11)

The presumption will be greater or less according to the probability of being able to impeach it, if not well founded. (11)

In an action against the drawer or endorser of a bill, the acceptance, though stated, need not, in general, be proved. (12)

But if a bill, in consequence of having an acceptance upon it pointing out a particular house for payment, be presented there for payment, and not at the drawee's residence or personally to the drawee, such acceptance must, in general, be

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Edmund Shanahan, and that that person dined at plaintiff's every day from 6th August to the 19th, and that he took a letter of credit from plaintiff, in the name of E. Shanahan, on Gibraltar. The action was at issue in Hillary 1817, but not tried till July 1820. At the trial it was insisted that there was no evidence that the person who endorsed was Edmund Shanahan, or the payee; and Dallas C. J. being of opinion that there was, a bill of exceptions was tendered; and upon argument, it was very strenuously pressed that the evidence was inadmissible to this point, and insufficient to prove it: but the Court thought clearly that the evidence was admissible and sufficient; that the possession of the bill, to which no person but Edmund Shanahan, the payee, or some one claiming under him, was entitled, was, whilst unexplained and unimpeached, primâ facie evidence that he was Edmund Shanahan, the payee; that the possession of the letter of recommendation which no one but Edmund Shanahan could rightly have had, was, whilst unexplained and uncontradicted, primâ facie evidence that he was Edmund Shanahan; and if this evidence were admissible, there was so much time for the right Edmund Shanahan to have come forward if this person were not the right Edmund Shanahan, and there were so many persons who could naturally be able to prove who was the right Edmund Shanahan, if this were not, that no doubt could be entertained of the sufficiency of the evidence: judgment affirmed.

(12) Tanner v. Bean, antè, p. 435. n. (124).

proved in an action against the drawer or an endorser; because, otherwise, the presentment at that particular house will not be a valid presentment. (13)

But if it can be shown that such acceptance was upon the bill when the defendant passed it, proof of the acceptance will be unnecessary. (13)

Proof that it was upon the bill when the plaintiff took it, if he did not take it immediately from the defendant, will not be sufficient. (13)

Where plaintiffs have no title upon a bill or note, unless they constitute a particular firm, they must prove that they constitute that firm:

As, if they sue upon a bill or note, payable to that firm by its name of business, without specifying its members;

Or specially endorsed to it.

But though several persons join in suing as endorsees, yet if they claim under an endorsement in blank they need not show that they are partners, or that they have a joint interest. (14)

It is, indeed, stated to have been held, that where a bill endorsed in blank is sent to a particular house, and an action is afterwards brought thereon by some of the members of that house and additional parties, there must be some evidence

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(13) Smith v. Bellamy, 2 Stark. 223. Second endorsee of bill against payee, on bill drawn on Stevenson, payable in London, with an acceptance thereon payable at Spooner and Atwood's. It had been presented there and there only. The acceptance was upon the bill when the plaintiff took it, but there was no evidence that it was so when defendant endorsed it and passed it away: it was urged that the jury might presume it was on the bill when plaintiff took it; Lord Ellenborough thought not, and as proof of the acceptance was necessary to make the presentment valid, he nonsuited the plaintiff.

(14) Ord v. Portal, 3 Campb. 239. Three persons sued as endorsees on a bill; the endorsement to them was in blank: it was urged that it ought to be shown that they were partners, or had a joint interest. Sed per Lord Ellenborough, "It is not necessary; the endorsement in blank gives a joint right of action to as many as agree in suing." Verdict for plaintiffs.

Rordasnz v. Leach, 1 Stark. 446. Two persons sued as endorsees; the endorsement to them was in blank: and on question whether they were bound to show a joint title, Lord Ellenborough held they were not.

that that house transferred the bill to the plaintiffs, or consented to their suing upon it (15):

And this, though the bill were sent to the house for the benefit of the persons who sue. (15)

[The holder of a bill or note is *primâ facie* the rightful owner, and need not prove a consideration, except where circumstances of suspicion appear. (*f*)

But the consideration of a bill or note may always be inquired into in an action between the original parties. (*g*)

A bill or note importing on its face to be for "*value received*," is *primâ facie* evidence of that fact, not only between the parties to the note, but against third persons, whenever the bill or note is admissible as evidence. (*h*)

The expression value received is also evidence of value received, in an action on a note not within the statute. (*i*)

But the presumption of *value received* arising from those words on the face of a bill, may be rebutted by circumstances; as if the payee should neglect entirely to present it for acceptance. (*h*)]

And in many cases the plaintiff is compellable to prove that either he or some preceding party took the bill or note bonâ fide, and for value;

As, in case of a bill or note originally given without con-

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(15) Machell, Boucher, and Birkbeck v. Kinnear, 1 Stark. 499. Plaintiffs were trustees of the estate of Holder, an insolvent; two of them were partners in the house of Langton and Co.: defendant being indebted to Holder sent a bill endorsed in blank to Langton and Co. on account of Holder's estate: the trustees sued thereon; but on an objection that Langton and Co. did not appear to have transferred the bill to the plaintiffs, or to have sanctioned their suing thereon, Lord Ellenborough held that proof essential, and nonsuited the plaintiffs.

[(*f*) Cruger v. Armstrong, 3 Johns. Cas. 5; Conroy v. Warren, 3 Johns. Cas. 259. See p. 337.

But in a case in Pennsylvania in 1792, in an action by the drawers who were also payees and endorsers of a bill, against the acceptor, it was held that the production of the bill and protest was not sufficient evidence to prove, that the plaintiffs had paid the amount to the endorsee, and judgment was given for the defendant. Gorgerat v. M'Carty, 1 Yeates, 94. S. C. 2 Dall. 144.]

[(*g*) Elting v. Brinkerhoof, 2 Hall, 459.]

[(*h*) Mandeville v. Welch, 5 Wheat. R. 277.]

[(*i*) Wolrad v. Petrie, 4 Wend. 575; Dugan v. Campbell, 1 Hammond's Ohio Rep. 115.]

sideration, and whilst the person giving it was under duress (16):

Or in case of a bill or note obtained by fraud (17):

[Or in case of a bill or note given by one partner in the partnership name in fraud of the firm (*k*)]:

Or in case of a transfer by delivery by a person not entitled to make it (18):

As, in the instance of bills or notes which have been stolen or lost. (18)

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(16) Duncan v. Scott, 1 Campb. N. P. C. 100. Endorsee against the drawer of a bill. It appeared that the defendant gave the bill while under duress abroad, and under a threat of personal violence and confiscation of his property, and that it was given without consideration. Lord Ellenborough held that the defendant not having been a free agent when he drew the bill, it was incumbent on the plaintiff to give some evidence of consideration; and no such evidence being given, the plaintiff was nonsuited.

[In an action against the endorser of a note, he gave notice to the plaintiff before the trial that evidence would be required of him of the consideration paid by him, and of the circumstances under which the note came into his hands. At the trial the defendant offered to prove that the note was fraudulently put into circulation by the maker. The Court refused to admit the evidence; or to make the plaintiff prove the manner in which he became possessed of the note. On error, Tilghman C. J. "The defendant was not permitted to make out a case which would have entitled him to a verdict, unless the plaintiff had come forward and cleared himself of suspicion. I am of opinion that the District Court erred in rejecting the evidence." Judgment reversed. Holme v. Karsper, 5 Bin. 469. See also Garriges v. Vogdes, 2 Browne's R. 262; and Coster v. Merest, 7 Moore, 87.]

(17) Rees v. Marquis of Headfort, 2 Campb. N. P. C. 574. In an action by an endorsee of a bill against the acceptor, it appeared that the drawer had received no consideration for the bill, and had been tricked out of it by a gross fraud; and Lord Ellenborough held that this made it incumbent on the plaintiff to show what consideration he gave for the bill; and the plaintiff not being prepared to do so, was nonsuited.

[(*k*) Heath v. Sansom, 2 B. & Adol. 291. See also Munroe v. Cooper, 5 Pick. R. 412.]

(18) Vide post, Chap. XII. where the cases as to stolen or lost bills are collected. [See also Fulton Bank v. Phœnix Bank, 1 Hall's R. 562.]

[In a case before the Supreme Court of Louisiana, it was held that the person in possession of a bank note which had been lost, was *primâ facie* a *bonâ fide* proprietor, and was not obliged to show how he came in possession of the note. The Court considered that bank notes were in this respect on a different footing from other bills and notes; and that it would be very inconvenient and tend to diminish the ready circulation of bank notes, if the holder of one which had been lost or

To compel a plaintiff, however, to give such proof, it may be prudent, and has been held necessary, to apprise him before the trial that such proof would be required from him. (19)

But though the neglect be proper for the consideration of a jury, and may be pressed upon them as a ground for distrusting the evidence that may be given upon the point, there is no legal principle which will warrant a judge in rejecting evidence offered by the defendant to make such evidence on the part of the plaintiff necessary, or in telling a jury they may disregard it. (20)

[And in a later case it seems to be held that no notice to the plaintiff is necessary, in order to let the defendant into his defence. (*l*)

In an action by a surviving partner against an endorser of a note, it has been held that the plaintiff cannot be called upon

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stolen could be called to prove how he came by it. Louisiana Bank v. Bank of the United States, 9 Martin, 398.

A bank received from a customer a note that had been stolen from the proprietor, and credited it in his account. On presenting the note for payment, the maker refused to pay it. At this time the bank had funds of the person from whom it received the note, to a much larger amount than the amount of the note, and for some days after. In an action on this note by the bank against the maker, it was held that the bank was not a bonâ fide holder *for a valuable consideration*, so as to entitle it to recover, as it was in the power of the bank to have charged the note back to the customer, when the facts in regard to it had been ascertained. Fulton Bank v. Phœnix Bank, 1 Hall, 562.]

(19) Paterson v. Hardacre, 4 Taunt. 114. In an action by endorsee against acceptor, the defence was, that an agent employed by defendant to get the bill discounted, had appropriated it to his own use, and absconded: it was urged, upon this, that plaintiff was bound to prove how he got the bill, and what consideration he gave for it; he was not prepared with such proof, and was allowed to take a verdict subject to the question, whether he was bound to give it; and on rule nisi for a nonsuit on this ground and time to consider, the Court held that where such a defence was contemplated, it was incumbent on the defendant to give distinct notice to the plaintiff that such proof would be called for at the trial; and because no such notice had been given, the rule was discharged. [See also Talman v. Gibson, 1 Hall, 308.]

(20) See Wyatt v. Campbell, 1 Mood. & Malk. 80.

[(*l*) Heath v. Sansom, 2 Barn. & Adol. 291. In this case the holder of a note's suing the makers rather than resorting to the endorsers, from whom he received it, who were solvent, was considered as a suspicious circumstance. But a majority of the Court do not seem to rely on this circumstance as dispensing with notice, but appear rather to consider a notice in any case as unnecessary.]

to prove a consideration or his title to the note, without some evidence having been brought to throw a doubt upon his right to sue. (*m*)

In an action by the third endorsee of a note against the acceptor, the defendant cannot put the plaintiff to prove the consideration which he gave for it, by giving primâ facie evidence of want of consideration as between the drawer and endorsers respectively. He must also show want of consideration as between himself and the drawer. (*n*)

In an action on a bill or note where the point in controversy is, whether the plaintiff received it on an illegal consideration, it has been held that he cannot be called on to prove what consideration he gave, by proving circumstances to excite suspicion that the consideration is illegal. It is for the defendant to make out the defence of illegality if he sets it up. (*o*)]

If two traders at distant places be in the habit of remitting to each other bills taken by the one, and payable in the place where the other resides, to take advantage of the exchange, and they divide the profits between them; if one take a stolen bill or note, and remit it, and the other sue upon it, he must give the same evidence of its having been taken for value and with proper caution as the person remitting it must have given. (21)

Especially, if each be answerable for the paper he remits.

And it will make no difference, that the balance between them when the bill was remitted was and still is in favor of the plaintiff to more than the amount of the bill or note.

At least, if plaintiff made no further advance, and gave no further credit than he would have done had the remittance not been made. (21)

[(*m*) Smyth v. Hawthorn, 3 Rawle, 355.]

[(*n*) Whitaker v. Edmunds, 1 Ad. & Ellis, 638.]

[(*o*) Bassett v. Dodgin, 10 Bing. 40. S. C. 3 Moore & Scott, 417.]

(21) De la Chaumette v. Bank of England, 9 Barn. & Cr. 208. Plaintiff lived in London; Odier and Co., in Paris; and Odier and Co. used to remit to plaintiff bills, &c. payable in London, and plaintiff to remit to Odier and Co. bills payable in Paris, that they might take the advantage of the exchange; and at the end of each year they divided the profits: each was answerable for the paper he transmitted. Odier and Co. transmitted a 500*l.* Bank of England note, but such note having

It has been laid down in (22) some cases, that in an action against the endorser of a bill, the plaintiff must prove an application to the drawer for payment; but it (23) is now fully settled he need not.

And an offer, after the bill or note has become due, to give the holder another bill in lieu of it, is an (24) admission of the holder's title, so as to supersede the necessity of proving the endorsements or other special facts.

So, (25) part payment of a bill or note after it has become due, without any objection being made for want of notice, or a

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been stolen from one Haselton, the bank stopped it: plaintiff brought trover, and it appeared that at the time this note was sent the balance against Odier and Co. was 1700*l.*, and that it was still 900*l.* Lord Tenterden, however, thought plaintiff identified with Odier and Co., and that unless they could recover he could not, and he left it to the jury, whether Odier and Co. took it in the ordinary course of business. The jury found for plaintiff; but there having been no proof, of whom or under what circumstances Odier and Co. took the note, the Court granted a new trial, that plaintiff might give evidence upon these points. The other Judges agreed that plaintiff stood in the same situation as Odier and Co.: he had made no further advance or given any further credit upon the remittance of this note.

(22) Vide Burr. 671.

(23) This was decided after two arguments in the case of a foreign bill in Bromley v. Frazier, Str. 441.; and in the case either of a foreign or inland bill, (but which does not appear,) in Lawrence v. Jacob, Str. 515; and in the case of an inland bill, Heylin v. Adamson, Burr. 669.

(24) Bosanquet v. Anderson, 6 Esp. N. P. C. 43. Endorsee of a bill against the acceptor. The bill was drawn in favor of the drawer, who had endorsed it; and his endorsement and several others were stated in the declaration. The plaintiff proved the first endorsement, and that when the bill became due, the defendant, being unable to take it up, came to the plaintiff and offered another in lieu of it. Lord Ellenborough held that this was an admission of the plaintiff's title, and dispensed with the proof of the several endorsements.

(25) Sidford v. Chambers, 1 Stark. 326. Plaintiffs sued as endorsees of Niblock and Co.; who were endorsees of Sheckles, to whom defendant had endorsed: they could not prove the endorsement of Sheckles, but they proved a letter from defendant to plaintiffs offering to substitute another bill, saying they had not money to take up the bill in question, and expressing a hope that it was not in the hands of Niblock and Co. Lord Ellenborough thought this evidence of the channel through which the bill had passed to plaintiffs, and made proof of the endorsement by Sheckles unnecessary; and plaintiff had a verdict.

Horford v. Wilson, 1 Taunt. 12. In an action by the endorsee against the drawer of a bill, which had been dishonored by the acceptor, it appeared that the defendant had paid part of the money due upon the bill, without making any objection for want of notice of the dishonor; and the Court held, upon a motion for a new trial, that from

(26) promise to pay, furnish grounds from which a jury may presume that it has been properly presented, that notice has been duly given, and that a protest (where necessary) has been made.

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this the jury were warranted in presuming that due notice had been given.

(26) Lundie v. Robertson, 7 East's Rep. 231. Endorsee against an endorser of a bill. No evidence was given of presentment or notice; but it was proved that on being called upon by the plaintiff's clerk some months after the bill was due, the defendant said, "he had not the cash by him, but if the clerk would call in a day or two, and bring the account" (meaning 'of the expenses') he would pay it;" the bill was shown him at the time. On a second application, he offered a bill on London for the debt and expenses, which was refused: he then said that "he had not had regular notice, but as the debt was justly due he would pay it." Chambre J. thought this sufficient; and verdict for the plaintiff. On a rule nisi for a new trial, and cause shown, Lord Ellenborough said, "the case admits of no doubt: it was to be presumed primâ facie from the promise to pay that the bill had been presented in time, that due notice had been given, that no objection could be made to payment, and that every thing had been rightly done; this superseded the necessity of the ordinary proof: the other conversation does not vary the case; for, though the defendant said he had not had notice, he waived that objection." Rule discharged.

See Gibbon v. Coggon, 2 Campb. N. P. C. 188, where, from the drawer's promising to pay a bill, Lord Ellenborough directed the jury to presume that it had been duly protested. See also Taylor v. Jones, 2 Campb. N. P. C. 105.

Greenway and Hindley, 4 Campb. 52. In an action by the endorsees of a foreign bill against the drawer, it was proved that long after the bill became due defendant called on the holder, and said he came to arrange the payment; and on being shown it, added, "it was regular; it was due from him and his partner, and that he was come to arrange for paying principal and interest." The declaration having alleged presentment and protest, it was urged that evidence ought to be given upon these points; but Lord Ellenborough said the defendant's acknowledgment was a sufficient foundation from which the jury might infer those facts; and verdict for plaintiffs.

Hodge v. Fillis, 3 Campb. 463. A bill was made payable in London, and accepted payable at Sir John Perring & Co.'s; and in an action against the acceptor, plaintiff had alleged presentment at Sir John Perring's, but could not prove it: Lord Ellenborough held the proof essential, unless there were something to dispense with it: plaintiff then proved that after the bill was due defendant promised payment, and Lord Ellenborough thought that made the other proof unnecessary; and verdict for plaintiff.

Wood v. Brown, 1 Stark. 217. In an action against the drawer of a bill, plaintiff proved a letter from defendant after the bill was due, in which he said he was an accommodation drawer only, and that the bill would be paid before the following term: Lord Ellenborough held that this made proof of notice of the dishonor unnecessary, and the plaintiff had a verdict without such proof.

And such presumption may be made (27), though the promise was not made to the plaintiff or in his presence, but to a subsequent endorsee who then held the bill or note: or to a prior endorser, who had not taken it up. (28)

And an agreement with a prior endorser, to pay the amount by instalments, is evidence, in favor of a subsequent endorsee, that the party agreeing to pay these instalments, had received due notice of the dishonor. (28)

Though there have been no due presentation, yet if there have been a subsequent application from an endorser for indulgence, it is for the jury to consider whether at the time of

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[See also Breed v. Hillhouse, 7 Conn. 523. Where the endorser of a note, on being called on for payment the day after it became due, said that the note was payable the day before, but that he did not deal in catches, and presumed he should call and discharge it,—it was held that this promise rendered it unnecessary to prove a demand on the maker. Hall v. Freeman, 2 Nott & M'Cord, 479.]

(27) Potter v. Rayworth, 13 East's Rep. 417. Endorsee of a note against the payee and endorser. It appeared that the note (which had been negotiated in the country) had been endorsed by the defendant to Fulford, by him to the plaintiff, by the plaintiff to Kirton, and by him to others, before it became due. A fortnight after it had become due, Kirton, who had taken it up, called on the defendant, who until then had received no notice of its dishonor: the defendant then promised to pay him the next day; having failed in this, Kirton resorted to the plaintiff, who paid the amount; and the defence now being the want of notice, the question was whether the plaintiff could avail himself of this promise so made to Kirton. Graham B. directed a verdict for the plaintiff; and on motion to set it aside, the Court (Grose and Le Blanc Js. absent) held that this promise was an acknowledgment by the defendant, either of notice, or that without notice he was the proper person to pay the note, and refused the rule.

(28) Gunson and others, assignees of Golding v. Metz, 1 Barn. & Cr. 193. Action against drawer on a bill endorsed by Kinnear to Golding. Plaintiffs proved the presentment, but, instead of proving notice to defendant, they proved an agreement between him and Kinnear eight months after this bill became due, which stated, that defendant had drawn and endorsed various bills, which were specified, one of which was the bill in question, and that they were or ought to be in Kinnear's hands, and then stipulated for payment by weekly instalments. Abbott C. J. thought this agreement evidence against defendant that he was liable, when the agreement was made, upon that bill, and consequently that he had previously received due notice of its dishonor; and on motion for a new trial, the Court agreed with him; for, had defendant been discharged by want of notice when he made the agreement, he would have insisted upon his discharge; he would not have agreed to pay the bill. Rule refused.

the application the endorser did not know there had not been a due presentation. (29)

A nonsuit, without leaving that point to the jury, is improper. (29)

If there have been laches in not giving notice, an endorser who may be prejudiced thereby in his remedies over against other endorsers, will not be precluded from insisting on such laches by having desired that the bill may be sent to him or some other person he names as soon as he receives notice; unless the bill when so sent be kept an improper time. (30)

[Where there is a subscribing witness to a note, in an action upon it, he ought to be produced at the trial to prove the signature of the party, or his absence accounted for. (*p*)

But it has been held that proof of the confession of the party signing the instrument, that he executed it, rendered it un-

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(29) Hopley v. Dufresne, 15 East, 275. Endorsee against endorser; the bill was accepted payable at Hammersley's, and there was no proof of presentment there till after the banking-hours; but after the declaration delivered, defendant had applied to plaintiff for further time to pay the bill: nonsuit, on the ground that no sufficient presentment was proved; but on rule nisi for new trial, and cause shown, the Court thought it should have been left to the jury to say, whether at the time of his application for time, defendant did not know there had been no due presentation: and on that account rule absolute.

(30) Borradaile v. Lowe, 4 Taunt. 93. Bill due 19th January; defendant was fifth endorser, Trever and Co. the fourth; 25th January, letter to defendant that it was dishonored, with reasons assigned for not writing sooner: defendant wrote for answer, "I cannot think of remitting till I receive the draft; therefore, if you think proper, you may return it to Trever and Co., if you think me unsafe." It was accordingly sent to Trever and Co., but they returned it in a few days, saying, they had applied to the third endorser, and received it back from him as out of time; and as the delay was with plaintiff, they thought themselves and defendant discharged. Action indè: laches in plaintiff was admitted, but defendant's letter was relied upon as an answer; the distinction between the situation of an endorser, whose remedy over may be lost by the holder's laches, and of a drawer, was strongly relied on for defendant; and on rule nisi for nonsuit, and cause shown, Mansfield C. J. said, "this letter contained no express promise to pay at all events," and he thought it would be too much to fix defendant here: in most cases where a defendant had been held liable there had been an express promise to pay, or a promise under full knowledge of being discharged, or a debt, binding in conscience, due from defendant. Rule absolute.

[(*p*) January v. Goodman, 1 Dall. 208.]

necessary in an action against him to produce the subscribing witness. (*q*)

And in a case where the subscribing witness was out of the government, it was held that other evidence might be produced of the signature of the maker of the note, without first proving the signature of the witness. (*r*)

Where the maker of a note signs it by his mark, and the subscribing witness is out of the State, evidence of the witness' handwriting is sufficient. (*s*)

In a suit brought in Louisiana against the maker of a note by the payee, the petition stated that both the parties were residents in Ohio, and no plea in abatement was filed; the note was witnessed, but did not express the place at which it was made. It was held that defendant, by not pleading in abatement, admitted the residence of the parties to be as stated in the petition; in the absence of all evidence on the point, that the presumption was that the witness also resided in Ohio, and therefore that other evidence than that of the subscribing witness was admissible to prove the maker's signature. (*t*)

In an action against A., as maker of a note payable to B. or bearer, to which there is a subscribing witness, the admission of A. that he gave a note to B. and a promise to pay it, made without seeing the note in suit, or having its date or amount stated, are not sufficient evidence to dispense with the production of the subscribing witness. (*u*)

[(*q*) Hall v. Phelps, 2 Johns. R. 451.]

[(*r*) The subscribing witness to a note in suit being out of the Commonwealth, in a neighboring State, other evidence was admitted of the signature of the maker, without proving the handwriting of the witness. Parker C. J. giving the opinion of the Court, said, "As the instrument in question is good without a subscribing witness, we do not think this strictness necessary; however it might be in relation to deeds or instruments under seal, where something more is necessary to be proved than the signature of the party." Homer v. Wallis, 11 Mass. R. 309.]

[(*s*) Bussey v. Whitaker, 2 Nott & M'Cord, 374.]

[(*t*) Crouse v. Daffield, 12 Martin, 539.]

[(*u*) Shaver v. Ehle, 16 Johns. R. 201. Per Curiam. "The identity of the note to which the defendant's confession related is not proved with reasonable certainty. Although there was a genuine note from him to A. or bearer, in existence somewhere, *non constat*, but that the note produced on the trial was a forgery."]

So where there is a subscribing witness to a note, the note cannot be admitted in evidence without producing the witness, or accounting for his absence, even where an instrument produced by the opposite party recognises the existence of the note. (*v*)]

A confession of his signature is sufficient evidence (31) against the party making it, but (32) not against any other party; and it is (33) sufficient, though made pending a treaty for a compromise.

[But the confession of his signature by a party to an instrument, is not conclusive evidence, even in an action against him. (*w*)

[(*v*) Jackson v. Sackett, 7 Wend. 94.]

(31) Cooper v. Le Blanc, Str. 1051. The plaintiff, on discounting a note, sent to the defendant to know whether an endorsement upon it was his, and the defendant said it was, and the note would be paid when due: he would notwithstanding have given evidence by similitude of hands that the endorsement was a forgery; but Lord Hardwicke would not allow it: he seemed inclined, however, to admit proof of actual forgery; but the defendant could not adduce it, and the plaintiff had a verdict. See Wilkinson v. Lutwidge, antè, p. 179, n (51), p. 486. n. (2).

Leach v. Buchanan, 4 Esp. N. P. C. 226. The plaintiff, before he took a bill, sent a person with it to the defendant to inquire whether the acceptance upon it were his handwriting; the defendant said that it was, and that it would be duly paid. He now offered evidence of the actual forgery of the acceptance; but Lord Ellenborough held that that proof would not discharge the defendant; that after having so accredited the bill and induced a person to take it, he was bound to pay it. Verdict for the plaintiff.

(32) Hemmings v. Robinson, Barnes, 3d ed. 436. In an action by the endorsee of a note against the maker, it was reserved as a point whether the acknowledgment of an endorser was sufficient evidence to prove his endorsement; and the court held it was not. See Gray v. Palmer, post, p. 504, n. (41).

(33) Waldridge v. Kennison, Espinasse, 143. In an action against two as acceptors of a bill, the only evidence of the signature by one was an admission he made pending a treaty for settling the cause: it was objected that this admission ought not to be received in evidence, because it was made under the faith of a compromise; but Lord Kenyon held that the admission of a handwriting might be received in evidence, though it was made under faith of a compromise; and he admitted it accordingly.

[(*w*) In an action against Huse, as the maker of a note, an acknowledgment by him of the signature was proved at the trial. The defendant was allowed to produce witnesses acquainted with his writing to prove that in their opinion the signature was not genuine; and also to prove the same by a signature known to be his. After a verdict for the

In an action on a bill, it has been made a question, whether an affidavit of the defendant, which implied that the plaintiff was rightful holder of the bill, should be permitted to go to the jury to prove the signature of an endorser. (*x*)

An offer made by the maker of a note to pay it to the plaintiff, in goods, is evidence that he admits the endorsements under which the plaintiff claims. (*y*)]

A confession by the person who was holder of a bill or note when it became due, is evidence against any person to whom he may afterwards endorse it. (34)

A confession by the person on whose account and for whose benefit plaintiff sues is evidence against plaintiff; unless plaintiff disclaim suing on that person's account. (35)

But before such confession is admitted in evidence, plaintiff has a right to have it proposed to him, if it can be matter of

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defendant, the court refused a new trial, saying that "it was merely a question of evidence, of which the jury were the judges." Hall v. Huse, 10 Mass. R. 39. The defendant in this case was 70 years old, and the evidence did not show that he had any reason to suspect, or did in fact suspect the signature, when he said it was his.]

[(*x*) In an action on a bill against Coolidge and Co. in order to prove an endorsement by the payee, the plaintiffs offered the affidavit of Coolidge filed in the case, in which he referred to the bill in such a manner as implied that the plaintiffs were rightful holders of the bill. Story J. permitted the affidavit to be read to the jury. Payson v. Coolidge, 2 Gallis. 233. On error to the Supreme Court of the United States, the court were divided on the question whether the affidavit ought to have been admitted. Coolidge v. Payson, 2 Wheat. 66.]

[(*y*) Keplinger v. Griffith, 2 Gill and Johns. 296.]

(34) Anon. Lancaster Assizes. A bill payable to the drawer's order was endorsed by him after it became due. Evidence was offered by defendant as to what the drawer had said respecting the bill; it was objected to, but Holroyd J. admitted it: he said "shifting the possession after the bill became due was not to vary the defendant's condition: plaintiff stands to all intents and purposes in the condition of the person who held it when it became due, and that was the drawer."

[See Shirley v. Todd, 9 Greenl. 83; Hatch v. Dennis, 1 Fairf. 244.]

(35) Shaw v. Brome, B. R. Trin. 1824. In an action by endorsee against acceptor, defendant proved that the bill was endorsed to plaintiff to indemnify him against being bail; that he had not been, and could not now be, damnified; defendant then offered in evidence declarations by the person who had endorsed the bill to plaintiff, on the ground that plaintiff must be suing as trustee for him, and on his account: the admission of these declarations was objected to, but they were received. On motion, the court thought it should have been put to plaintiff, to say whether he was suing for the endorser's benefit, and that, until that question was put and answered, the declarations could not properly be received.

doubt, whether he does or does not sue on that person's account. (36)

And, in general, a confession by the holder of a bill or note before it became due is no evidence against a person who took it *bonâ fide* and for value before it became due. (36)

Against a person who gave no value for it, or took it *malâ fide*, the declarations of the person from whom he took it, or of a prior party, may be evidence. (37)

Proof of the signature by a person who has no knowledge of the handwriting, except from having seen the party once write his name, may be sufficient, if the party then wrote his name at length (38);

Or as much thereof as the signature to be proved contains: (38)

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(36) Smith v. De Wruitz, 1 Ryan & Moody, 212. In an action by endorsees against acceptor, defendant offered to prove declarations by the drawer, made whilst he held the bill; but, the endorsement to plaintiffs appearing to have been before the bill was due, and there being nothing to impeach the plaintiff's title, Abbot C. J. rejected the evidence: upon other proof, however, there was a verdict for defendant.

(37) Pocock v. Billings, 1 Ryan & Moody, 127. In an action by endorsee against acceptor, the defence was, that the drawer had negotiated the bill after he became bankrupt, and that neither plaintiff nor any of several other endorsers had given value for it; and the declarations of an endorser whilst he held the bill were offered in evidence. Best C. J. admitted them, as declarations against his own interest; and likened them to declarations by the owner of an estate during his possession.

N. If there were previous proof to impeach plaintiff's title, and that of all the intermediate parties, between him and the endorser whose declarations were offered in evidence, the declarations were, perhaps, rightly admitted. The holder of a bill stands in a very different situation from the owner of an estate: the latter can have no title, unless the person from whom he took had: the former, on the ground of a bill or note being negotiable, may.

(38) Powell v. Ford, 2 Stark. 164. To prove an acceptance, in which the defendant wrote his Christian name at length, plaintiff called a witness who had no other knowledge of defendant's handwriting but from having once seen him sign his name, where he put the initial only for his Christian name, "M. Ford." Lord Ellenborough thought his evidence might have been sufficient, had he ever seen defendant write his name at length; but that as he had never seen him write his Christian name, the Christian name could not be inferred to be genuine from evidence as to the surname, any more than proof by a person who had seen him write some only of the letters which occurred in the surname could be competent to prove the whole surname. Nonsuit.

Otherwise, it is not sufficient. (38)

[Where a name on a bill or note is not written by the party, but by the plaintiff, the party having only made his mark, the mark may be proved by a person who has seen the party execute other instruments in a similar manner. (*z*)

In Massachusetts a comparison by the jury of a disputed signature with genuine signatures of the party, is competent evidence. (*a*)]

In an action against the drawer of a lost bill, Holt C. J. (39) held proof, that the defendant owned he had made the bill, sufficient.

So, in an action against an endorser, proof that the defendant admitted to have received a bill corresponding with that upon which the action was brought, that after issue joined he had declared that he came to town to hasten the trial of a cause brought against him on an endorsement he had made upon a bill, and that he carried the cause down by proviso, was (40) held sufficient.

In an action against several drawers, endorsers, or acceptors, an admission upon the pleadings by one of his signature will (41) not exempt the plaintiff from proving it against the others, if they contest it.

[(*z*) George v. Surrey, M. & M. 516.]

[(*a*) Parker C. J. in delivering the opinion of the court, says, "Whatever doubt there may now be in England as to this species of evidence; for in former times it was holden admissible, and has never yet, to our knowledge, been absolutely settled otherwise); we have no doubt, that a comparison by the jury of the contested signature with other writings proved to be genuine, has become by long and invariable usage in this State, competent evidence." Homer v. Wallis, 11 Mass. R. 300. See also Hall v. Huse, antè, p. 501.]

(39) This was the case of Hart v. King, 12 Mod. 309.

(40) Dale v. Lubbuck, 1 Barnard, B. R. 199. In an action against an endorser the evidence was, that he had written a letter stating that he had received a bill from A. upon B. bearing date such a day, and payable to him or order six months after date (in all which circumstances the bill stated in the letter corresponded with the bill declared upon), but not mentioning the sum; that he had said he came up to town to hasten on the trial of an action brought against him on an endorsement he had made upon a bill, and that, in fact, he carried down the cause by proviso; and Raymond C. J. held this sufficient evidence to prove that the defendant endorsed the bill stated; and the jury found for the plaintiff.

(41) Gray v. Palmer, Espinasse, 125. Action against James Palmer,

Though a person sued as acceptor of a bill prove that the acceptance was forged, yet if it appear that he and the party who committed the forgery had been connected in business, and that the defendant had paid other bills drawn by such party, and accepted similarly to that on which the action is brought, it will be sufficient; because, it shows that he (42) had sanctioned such acceptances, and rendered himself liable to pay them.

[So in an action against a person as endorser of a note, where it appeared that the endorsement had been forged by the maker, it was held that the defendant, having previously had notice of several similar forged endorsements of his name previously made by the maker, without objecting to them, had virtually authorized this, and made it his own. (*b*)

In an action against a person as endorser of a note where his name is in the handwriting of the maker, the plaintiff may prove that the defendant remained silent though notified of the dishonor of the note, was sued, suffered a default in pleading, took no measures to defend the suit until after the maker absconded, and had assumed the payment of other notes similarly situated; and it will be for the jury to decide, taking into

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John Palmer, and Hodgson, as makers of a note; Hodgson pleaded a judgment recovered, and each of the Palmers, non assumpsit: upon the trial on the non-assumpsit, the plaintiff proved the subscription by each of the Palmers, and there rested his case. The Palmers contended that he ought to prove Hodgson's subscription also, but the plaintiff insisted that *that* was admitted by the plea of nul tiel record. Lord Kenyon, however, held that it was only admitted as against Hodgson, not against the Palmers, and that the plaintiff could not recover against them without proving it.

(42) Barber v. Gingell, 3 Esp. N. P. C. 60. In an action against the defendant as acceptor of a bill, he proved that the acceptance was forged by Taylor the drawer; in answer to which it was proved that the defendant had been connected in business with Taylor, and that he had paid several bills drawn as the present by Taylor, and to which Taylor (as it was supposed) had written the acceptances in the defendant's name. And Lord Kenyon held that this was an answer to the case of forgery set up by the defendant; for, though he might not have accepted the bill, he had adopted the acceptance, and thereby made himself liable to pay the bill. Verdict for the plaintiff.

See Gibson v. Hunter, 2 H. Bl. 288.

[(*b*) Hartford Bank v. Hart, 3 Day, 491.]

consideration the situation of the parties, whether the maker had authority to endorse the defendant's name. (*c*)

Where an old and a new bank had been incorporated by the same name, and the new bank had received and issued notes of the old bank, it was held that the new bank was not liable on notes of the old bank not actually issued by the new bank. (*d*)

A bank receiving notes appearing to be its own, but in fact forged, and paying cash for them, cannot afterwards recover back the amount paid, from the party who presented them, if a *bonâ fide* holder. (*e*)

So a bank receiving notes as its own, and crediting them as cash to the party who presented them, cannot afterwards in an action by the party who paid them in, a *bonâ fide* holder, be permitted to prove thatthey were forged. (*e*)

[(*c*) Weed v. Carpenter, 10 Wend. 403.]

[(*d*) The President, Directors and Co. of the Hallowell and Augusta Bank were incorporated in 1804. Another corporation was incorporated by the same name in 1812, which had the same president and cashier as the old one. In an action against the new bank, in order to charge it with notes made by the old bank, it was proved that the new bank had received and passed or issued bills of the old bank; that the cashier and some of the directors of the new bank had frequently declared that there were no distinction between the notes which were issued before, and those issued after the incorporation of the new bank, and that this conduct of the new bank and these declarations had occasioned many of the notes of the old bank, and probably those in suit, to become current and be received as good. Parker C. J. who tried the case, being of opinion, that nothing short of proof that the notes sued or some of them, were issued by the new bank, as their own notes, with an intent to have them considered as evidence of promises on their part, would entitle the plaintiff to recover, nonsuited the plaintiff. And the whole Court overruled a motion to set aside the nonsuit. Parker C. J. giving the opinion of the Court, said, "We are not clear that with such proof the defendants would be answerable, unless it were likewise proved that the company, by some vote or legal act, had authorized the directors or officers of the corporation to bind them in this unusual way." Wyman v. Hallowell and Augusta Bank, 14 Mass. R. 58.]

[(*e*) In an action by the United States Bank against the Bank of Georgia, the latter set up as a defence a payment from the former of certain notes of the Bank of Georgia, which had been fraudulently altered by some persons unknown from a small to a larger amount, which payment had been credited as cash to the United States Bank, and was the amount claimed in the suit. The Bank of Georgia did not give notice of this alteration of the notes until eighteen days after receiving them, and did not offer to return them until the nineteenth

But where a sealed package was given to an officer of a bank, represented to contain notes of the bank to a certain amount, and he, without examining the notes, paid that amount to the party presenting them, a *bonâ fide* holder, and the bank on examination found some of the notes were forged, the Court was of opinion that the bank might have reclaimed the amount of the forged notes from the party passing them, if notice had been immediately given. But the bank having neglected for fifteen days to give notice to the party who passed the notes to it, it was held that the bank had by this delay made the notes its own, and could not afterwards be allowed to reclaim the money paid, on account of the notes being forged. (*f*)

Where the notes of a bank after being signed by the cashier, were stolen from the banking-house, and the signature of the president forged upon them; it was held that the bank

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day. Story J. delivered the opinion of the Court. "We think the defendants were bound to know their own notes, and having once accepted the notes in question as their own, they are concluded by their act of adoption, and cannot be permitted to set up the defence of forgery against the plaintiffs." United States Bank v. Bank of Georgia, 10 Wheat. R. 333.]

[(*f*) One of the directors of the Gloucester Bank received from the Salem Bank, at the banking house of the latter bank, a sealed package represented by the Salem Bank to contain notes of the Gloucester Bank to the amount of $8500; and paid for them without opening the package, and the next day delivered the package unopened to the cashier of the Gloucester Bank. Fifteen days afterwards the Gloucester Bank, for the first time, intimated to the Salem Bank that some of the notes were forged, and a month afterwards offered to return the notes to the Salem Bank. The Gloucester Bank then sued the Salem Bank to recover the amount of part of the notes as being forged. At the trial Parker C. J. nonsuited the plaintiffs. On motion for new trial, Parker C. J. delivered the opinion of the Court. "As the delivery of the notes was not at the bank, nor in banking hours, and was accompanied with a declaration that they were good bills, a reasonable time should have been allowed to count and examine them. Had this been done the next morning at the Gloucester Bank, and the notes been immediately returned, or a tender of these made, there can be no doubt an action might have been maintained."—"The party receiving such notes must examine them as soon as he has opportunity, and return them immediately. But if he pays them, and continues silent, after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own." Motion overruled. Gloucester Bank v. Salem Bank, 17 Mass. R. 33.]

was not liable to a *bonâ fide* holder of the notes for the negligence of its officers in so keeping the paper that it was stolen, and put into circulation with a forged signature; it was also held that the bank was not liable in assumpsit to the holder of such notes, though the officers of the bank did not pronounce them counterfeit when first presented for payment, but expressed an opinion that they were genuine, though they refused to pay them. (*g*)

In Kentucky, by statute, in an action against a party to a bill or note, the genuineness of the signatures need not be proved, unless denied on oath by the party sued. (*h*)

In Louisiana it is not necessary to prove the defendant's signature to a note unless it be specially denied. (*i*)]

The signature of a partner or servant, importing to have been made on the partnership or master's account, is to be considered as the signature of the (43) partnership or master.

On a signature by a servant, the servant's authority must be proved.

An authority by parol is (44) sufficient.

Subsequent assent is (45) evidence of precedent authority.

Usual employ is evidence (46) of a general authority; and a general authority is supposed to continue until its determination is notorious.

Therefore, after the discharge of a servant usually employed, a (47) man will be bound by his signature until his discharge is generally known.

[(*g*) Salem Bank v. Gloucester Bank, 17 Mass. R. 1.]

[(*h*) Frazier v. Harvie, 2 Litt. 180.]

[(*i*) Miller v. Cohea, 1 Miller, 486.]

(43) Vide Pinkney v. Hall, Lord Raym. 175. Smith v. Jarvis, Lord Raym. 1484., Carvick v. Vickery, Dougl. 630, n. 134.

(44) 12 Mod. 564.

(45) Comb. 450.

(46) 12 Mod. 346., Malynes, B. 3. c. 5. s. 6. p. 264., 10 Mod. 110.

[Prescott & Stevens v. Flynn, 2 Moore & Scott, 18; 9 Bing. 19. Where a confidential clerk of a firm was accustomed to draw bills and checks for the defendants, and on one occasion he had drawn a bill in the name of the firm to one of the defendants, who endorsed it over, and, on two other occasions, had endorsed bills which had been discounted by the defendant's bill broker; this was held to be a sufficient ground for the jury to infer a general authority to draw and endorse bills.]

(47) Vide Beawes, s. 231. p. 445. Molloy, B. 2. c. 10. s. 27.

The clerk who signs bank notes need not have authority for the purpose under the common seal of the Bank. (48)

And now, by 1 Geo. 4. c. 92. s. 3., his signature may be impressed by machinery.

[An averment of presentment is supported by proof of presentment of a copy of a lost note. (*k*)

In an action against the endorser of a note, evidence that the defendant has said that the maker of the note informed him that payment had been duly demanded of him, will not prove a demand. (*l*)

The delivery of a bank check by one bank to the porter of the bank on which it is drawn, and the return of the same as not good, accompanied by evidence of the invariable practice of the porter to present checks thus received, and to return them, if dishonored, on the same day they are delivered to him, is sufficient proof of presentment to authorize the submission of the case to the jury. (*m*)

In an action against the endorser of a note, a record of a recovery in a former action between the same parties in which it was necessary to show the defendant's liability as endorser, is sufficient evidence to establish demand and notice. (*n*)]

Where notice is sent by the post, proof of putting the letter into the post is (49) sufficient, if the letter were properly addressed. (50)

Proof of sending one of two duplicate notices by the post may be established by the duplicate notice, without giving notice to produce that which was sent. (51)

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(48) Brown v. Messiter, antè, p. 417, n. (83).

[(*k*) Hinsdale v. Miles, 5 Conn. R. 331.]

[(*l*) Tower v. Durell, 9 Mass. R. 337.]

[(*m*) Merchants' Bank v. Spicer, 6 Wend. 443.]

[(*n*) Wright v. Butler, 6 Wend. 284.]

(49) Saunderson v. Judge, antè, p. 201, n. (13). p. 275, n. (116). [See also p. 277, note (*p*).

The Court were unanimously of opinion that "evidence of the letter containing notice having been put into the post-office, directed to the defendant, (an endorser,) at his place of residence, was sufficient proof of notice to be left to the jury; and that it was unnecessary to give notice to the defendant to produce the letter before such evidence could be admitted." Lindenberger v. Beall, 6 Wheat. R. 104.]

(50) As to what is to be deemed a proper address, vide anté, p. 276.

(51) Roberts v. Bradshaw, 1 Stark. 28. In an action by endorsee of

Proof of sending notice by letter may be established, without giving notice to produce that letter. (51)

[And parol evidence is receivable to prove the sending of a notice in writing, without any notification to produce the written notice. (*o*)]

Proof that duplicate notices were written in order that one might be sent, and that a letter was sent to defendant at that time, will be sufficient evidence that such letter contained the notice, if defendant, on notice, do not produce such letter. (51)

But, it has been held, that proof that a notice was put into the post, either the day it ought to have been sent, *or the day following*, is not (though notice to produce be given) sufficient evidence that the notice was sent in time: (52)

And that it cannot be submitted to the jury for their consideration. (52)

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a bill against drawer, plaintiff's clerk proved that, on the day the bill was dishonored, his master gave him two papers to compare, purporting to be notices of the dishonor of the bill, one of which he produced; it was objected that the one produced could not be read unless notice had been given to produce the other. Lord Ellenborough thought otherwise, and said, a letter acquainting a party with the dishonor of a bill was in nature of a notice, and it was unnecessary to prove notice to produce such a letter; plaintiff could not then prove specifically that any notice was sent, but he proved that the same day he sent a letter to defendant, the contents of which his witness did not know, and that he had given due notice to produce that letter. Lord Ellenborough thought this sufficient evidence that the letter amounted to notice, for if it did not, defendant might produce it: and plaintiff had a verdict. Defendant moved for a new trial, but the Court of King's Bench refused a rule.

[See also Lindenberger v. Beall, supra; Johnson v. Haight, 13 Johns. R. 470; Clarke v. Harris, 3 Har. & John. 167.]

[(*o*) Abat v. Rion, 9 Martin, 465; Eagle Bank v. Chapin, 3 Pick. 180; Leavitt v. Simes, 3 N. H. Rep. 14.]

(52) Lawson v. Sherwood, 1 Stark. 314. In an action against an endorser, it was necessary for plaintiff to prove that notice was sent to the defendant the second day after the bill became due: a witness proved that he sent him a notice two or three days after the bill became due, but whether it was the second or third day he could not state; notice to produce was proved, and it was urged for plaintiff, that as defendant did not produce what had been sent, this was evidence to go to the jury that the notice was sent on the second day: but Lord Ellenborough thought otherwise; he said, "the non-production only entitled plaintiff to give parol evidence of its contents: plaintiff was bound to give notice on the second day, and evidence that he gave it either on that or the following day could not be left to the jury as evi-

[If proof of notice put into a post-office be given, it is no reason for a new trial that the notice was not directed to the post-office nearest to the defendant, no question being made at the trial on this point. (*p*)

In an action against the endorser of a note, it was held to be sufficient evidence of notice to go to a jury that the cashier of the bank in which the note was placed, testified that he had sent notice to the post-office, that it was his custom to send such notices directed to the post-office nearest the endorser's residence, though he was not positive whether it was directed to that or another post-office. (*q*)

Evidence that it is the uniform practice in a merchant's counting-room to forward all notices as soon as they are received, is inadmissible for the purpose of showing that a notice of the dishonor of a note which had been sent under cover to him, had been seasonably forwarded according to the direction. (*r*)

After the death of a person, usually employed to make presentment to the makers, and give notice to the endorsers of notes, as a sworn bank messenger or notary public, the book of such person in which he recorded his proceedings upon notes, is admissible evidence to prove a presentment or notice. (*s*)

So where the cashier of a bank was in the practice of giving notice to endorsers of the dishonor of notes, in the name of the notary of the bank, a memorandum made by the cashier of his having notified the endorser of a note in the

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dence that he gave it on the second." Plaintiff was therefore nonsuited.

[(*p*) Gist v. Lybrond, 3 Hamm. 307.]

[(*q*) State Bank of Elizabeth v. Ayers, 2 South. R. 130.]

[(*r*) Flack v. Green, 3 Gill & Johns. 474.]

[(*s*) The messenger of the State Bank kept a book in which he entered his doings with respect to notices to makers and endorsers of notes belonging to the bank and of those left for collection. The by-laws of the bank made it his duty to keep such a book, and to take an oath faithfully to perform his duty. In an action against the endorser of a note which had been left in the bank for collection, it was held that the book of a deceased messenger, after proving his handwriting, was admissible evidence to go to the jury to show a demand on the maker and notice to the endorser. Welch v. Barrett, 15 Mass. R. 380.]

bank, was, after his death, held to be primâ facie evidence of notice. (*t*)

The protest of a *note* by a notary, is after his decease evidence of the demand and notice stated in the protest. (*u*)

It is not such evidence while the notary is living. (*v*)

But where a memorandum in the register of a notary deceased before the trial, merely stated that notice to the endorser of a note was put into the post-office, but did not state where the endorser resided, or to what place the notice was directed, or that any inquiry was made to ascertain his place of residence, it was held that the memorandum was not sufficient evidence of notice. (*w*)

(*t*) Nichols v. Goldsmith, 7 Wend. 160.

(*u*) In an action against the endorser of a note payable at the Nashville Bank, the notary who made the demand and gave the notice having died before the trial, the plaintiff offered in evidence his protest, which stated that he had made a regular demand and given notice to the endorser, and the deposition of a witness which stated that the notary kept a book in which he recorded copies of the notes protested by him and of the protests, and memorandums of the manner of giving notice. A copy of the protest was annexed to the deposition. This evidence, though objected to, was admitted, and a verdict given for the plaintiff. On error, Story J. delivered the opinion of the Court. Memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. *A fortiori* we think the acts of a public officer, like a notary public, admissible, although they may not be strictly official, if they are according to the customary business of his office, since he acts as a sworn officer, and is clothed with public authority and confidence." Judgment affirmed. Nicholls v. Webb, 8 Wheat. R. 326. See also Halliday v. Martinet, post, p. 513, and Sharp v. Bingley, 1 S. Car. R. 373.]

(*v*) Whitington v. Farmers' Bank, 5 Har. & John. 489.]

(*w*) In an action against the endorser of two notes, the plaintiff offered in evidence the protests of Bleecker, a notary public, who had died before the trial, which stated that he had made diligent inquiry for the maker, in the city of New York, where the notes were dated, but could not find him: he also offered the register of the notary, in which were inserted copies of the notes and protests, and which stated that he had put notices for the endorser in the post-office. A clerk of the notary testified that it was the usual course of business in the notary's office to make inquiry to ascertain the place of the endorser's residence, and if it could not be found to put a notice in the post-office, and that he had no doubt such inquiry was made in this case, and that the endorser's residence could not be ascertained, though he did not *know* the fact. Nonsuit. Woodworth J. delivered the opinion of the Court. "I am satisfied on principle and authority that the evidence was competent,

In South Carolina, by statute, the protests of notaries who are dead or reside "out of the district" in which the suit is brought, are evidence of demand and notice. (*x*)

By statute in Louisiana, a notary is authorized in his protest of a bill or note to make mention of the manner or circumstances of the presentment, and in his certificate added to the protest to state the manner in which notices to the drawer, endorsers, or other persons were served or forwarded; and a certified copy of such certificate and protest is made evidence of "all the matters therein contained." (*y*)

By statute in Louisiana, in order to make a notary's certificate evidence of notice, his certificate must be recorded under his signature and that of two witnesses. (*z*)

The certificate of a notary in Louisiana that he notified the endorser of a note by express, is not sufficient evidence of notice. (*a*)

Such a certificate is admissible in evidence, though it may not establish all the facts necessary to support the plaintiff's claim. (*b*)

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and that there was due diligence to demand payment of the maker."—"It remains wholly uncertain whether diligent inquiry was made for the endorser, and that he could not be found; and whether he resided in the city of New York or at what other place. If the notary had stated, that the endorser could not be found, he would have made out sufficient to entitle the plaintiff to recover; but to charge an endorser by merely proving the general practice of the office in other cases, accompanied by the opinion of a witness not resting on any recollection or knowledge, but manifestly derived from such usual practice only, would, in my judgment, be dangerous." Judgment affirmed. Halliday v. Martinet, 20 Johns. R. 168.

But in a previous case, where the evidence of notice to the endorser of a bill consisted of the deposition of the notary who protested the bill, who stated that it was his usual practice on the evening of the day of protest in all cases to give notice in writing to endorsers residing at a distance by putting a notice directed to the party at his place of residence into the post-office, and that he had no doubt notice in this case was duly given, though he could not recollect positively; and that it was possible he might have given the notice to the holder to be forwarded; the evidence of notice was held to be sufficient in the first instance. Miller v. Hackley, 5 Johns. R. 375.]

[(*x*) Dobson v. Laval, 4 M'Cord, 57.]

[(*y*) Statute of March 13, 1827, as quoted in Preston v. Dayesson, 7 La. R. 7.]

[(*z*) Allain v. Whitaker, 17 Martin, 511.]

[(*a*) Duralde v. Guidrey, 17 Martin, 65.]

[(*b*) Dicks v. Chew, 18 Martin, 394.]

A certificate of a notary in a State where it is admissible as evidence of notice given to the endorser of a note, does not prove such notice, where it says he put the letter of notice in the post-office, without stating what post-office. (*c*)

It has been ruled at *nisi prius*, that the entry of a clerk of a notary in his books, stating search for the maker, and notice to the endorser, could not be received in evidence in an action against the endorser, though the clerk at the time of the trial was absent on a voyage. (*d*)

So the register of a notary is not evidence of demand and notice on a note, where the entries were made by his clerk, who was still alive, though he was out of the jurisdiction of the court and could not be found on diligent inquiry. (*e*)

The oath of a notary that he protested a bill, and that he was generally in the habit of giving notice on all protested bills, and presumes that he gave notice to the defendant, as he was requested to be very particular about it; and that his habit was to put notices into the post office by the first mail, but having a great deal of protesting to do that summer, he has no distinct recollection about notifying the defendant, is not sufficient proof of notice. (*f*)

But where a notary swore that he had no recollection of giving notice, except from his own memorandum on the back of the protest, but that he had no doubt he had given it, as he never made a memorandum without having given the notice, it was held this was legal evidence of notice. (*g*)

The *ex parte* affidavit of a notary's clerk cannot be received in evidence after his death, to prove notice to the endorser of a note. (*h*)

Nor is evidence admissible that the clerk inquired where the endorser lived, declaring that he was going to serve him with

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[(*c*) Laporte v. Landry, 16 Martin, 331; Pritchard v. Hamilton, 18 Martin, 456.. See also Allain v. Whitaker, 17 Martin, 511.]

[(*d*) By Van Ness J. in Cummings v. Fisher, Anth. N. P. 1.]

[(*e*) Wilbur v. Selden, 6 Cowen, 162.]

[(*f*) Hoff v. Baldwin, 12 Martin, 699. Cumberland Bank v. M'Kinley, 6 Har. & John. 527, is a similar case, and decided in the same manner. See also Halliday v. Martinet, antè, p. 513.]

[(*g*) Bullard v. Wilson, 17 Martin, 196. See Miller v. Hackley, antè, p. 513.]

[(*h*) Farmers' Bank of Lancaster v. Whitehill, 16 S. & R. 89.]

notice; accompanied by evidence, that on receiving the information, he set off in the direction of the endorser's residence. (*h*)

In an action against the drawer of a bill not accepted, the declaration of the drawee at the time of the presentment, that he had no funds of the drawer, are not admissible in evidence for the plaintiff to excuse the want of notice. (*i*)

At the trial of an action against the drawer or endorser of a foreign bill, a notarial copy of the protest must be produced, or its absence accounted for. (*k*)]

Production of the instrument is (53) sufficient evidence of a protest.

[This, however, is only when the protest is made by a notary, a notary being the only officer recognised by the commercial law. If a protest be produced, made by any other officer, it cannot be received in evidence without proof that such officer is the proper person to make protests by the law of the country where the protest is made. (*l*)

A protest made by a huisseur in France, cannot therefore be admitted in evidence, without proof that he is an officer authorized by the law of France to make protests. (*l*)

Proof that original protest for non-acceptance was lost, and

[(*i*) Carle v. White, 9 Grecnl. 104.]

[(*k*) Chase v. Taylor, 4 Har. & John. 54.]

(53) Anon. 12 Mod. 345. To prove a protest, the plaintiff produced an instrument attested by a notary public; and though it was insisted that he should prove this instrument, or at least give some account how he came by it, Holt C. J. ruled that it was not necessary.

[S. P. Bolton v. Harrod, 9 Martin, 326.

See also Fenwick v. Sears, 1 Cranch, 259. In this case the questions,—whether the acts of a notary public, who certifies himself to be duly commissioned and sworn, are valid, if he be duly appointed, but not sworn: and whether between the parties to a bill, the certificate of the notary who protested it, that he is "duly commissioned and sworn," be not conclusive evidence of the fact,—were argued, but no opinion given.

The certificate of a notary under his notarial seal, is *primâ facie* evidence that he is duly commissioned by the governor. The Court said, that it had been the daily practice to receive such certificates without objection. Browne v. Philadelphia Bank, 6 Serg. and Raw. 484.

The copy of a protest under the seal of the notary is admissible as evidence of presentment, non-acceptance, and non-payment. Bryden v. Taylor, 2 Har. & John. 400.]

[(*l*) Chanoine v Fowler, 3 Wend. 173.]

the record of former judgments on the same bill in suits by the holder against the first and second endorsers, are sufficient evidence of protest for non-acceptance in a suit by the second endorser against the first. (*m*)

An error in the protest in the name of the party at whose request it is made, does not vitiate it. (*n*)

If a notary state in his certificate of protest, that he has no seal, the certificate is held to be admissible in evidence, without any seal. (*o*)

A protest of an inland bill or note is not evidence of a demand or notice. (*p*)

But a protest of a bill drawn in one of the States and payable in another, is itself evidence of the presentment and dishonor. (*q*)

In an action upon a lost note the plaintiff must prove its loss and contents by the best evidence in his power.

It seems that a notarial copy may be received in connexion with other evidence, to prove the contents of the note, but it is not necessary for the plaintiff to produce a notarial copy.(*r*)

[(*m*) Clarke v. Harris, 3 Har. & John. 167.]

[(*n*) Whittington v. Farmers' Bank, 5 Har. & John. 489.

The protest stated that it was made at the request of the Farmer's Bank, &c. The holders of the note and plaintiffs were the "President and Directors of the Farmers' Bank," &c. Held, not to be material; and that the protest might be read in evidence.]

[(*o*) Bank of Kentucky v. Parsley, 3 Monroe, 236.]

[(*p*) Nicholls v. Webb, 8 Wheat. R. 326; Union Bank v. Hyde, 6 Wheat. R. 572; Cummings v. Fisher, Anth. N. P. 1.

In Pennsylvania a protest of a note by a notary has been held to be evidence of the demand and notice stated in the protest, by virtue of the statute of that State of January 2, 1815, which enacts that the *official* acts, protests, and attestations of all notaries public, may be received as evidence of the facts therein certified. Browne v. Philadelphia Bank, 6 Serg. & Raw. 484.]

[(*q*) This point was so decided by Washington J. in Lonsdale v. Brown, 4 Wash. C. C. R. 86, and 148, on the ground that such a bill was a foreign bill. The same decision was given by the Supreme Court of the United States, on the ground that it was the general custom of merchants in the United States to admit protests of such bills in evidence, and that such was the law of Kentucky, the State in which the contract for acceptance sued upon was made. Townsley v. Sumrall, 2 Pet. Sup. C. R. 170. See also Buckner v. Finley, ante, p. 22.]

[(*r*) In an action upon a lost note, a notarial copy was permitted to go to the jury, connected with other evidence which showed that the makers had admitted their liability upon the note, although the notarial

In an action on a lost bill, after its existence is proved, the plaintiff may prove its loss by his own oath. (*s*)

In an action against the drawer of a bill, it is a sufficient excuse for not producing the instrument, to prove that it was lodged with the commissioners of bankruptcy under a commission issued against the drawer, and still remains with them. (*t*)

In an action on a lost note, it is not necessary to produce direct and positive evidence of its destruction; it is sufficient to produce evidence from which a jury may reasonably infer its destruction. (*u*)]

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copy was the only evidence of the date and amount of the note. Peabody v. Denton, 2 Gallis. 351. See also Anderson v. Robson, 2 Bay, 495.

In an action on a lost note, Thompson J. who delivered the opinion of the Court, said, "Proof of the contents of a lost paper ought to be the best the party has in power to produce, and at all events such as to leave no reasonable doubt as to the substantial parts of the paper. But to have required a notarial copy, would have been demanding that of the existence of which there was no evidence, and which the law will not presume was in the power of the party; it not being necessary that a promissory note should be protested." Renner v. Bank of Columbia, 9 Wheat. R. 581.]

[(*s*) Meeker v. Jackson, 3 Yeates, 442. The Court said that the plaintiff was a witness from the necessity of the case.

The loss or destruction of an original paper may be proved by the oath of a party, preparatory to letting in evidence of its contents. Tayloe v. Riggs, 1 Peters, 578.

The oath of the creditor is allowed in civil law countries to prove the loss of an obligation, and he may compel the debtor to give a new one on giving good security against the first. Van Leuwen, Cens. For. P. II. L. 1. c. 29. 14.]

[(*t*) Palmer v. Blight, 2 Wash. C. C. R. 96.]

[(*u*) Swift v. Stevens, 8 Conn. 431. This was an action on a note payable to bearer. The plaintiff proved by the cashier of a bank that the note had been delivered to him, the cashier, for safe keeping, that afterwards he made diligent search for it, but had never been able to find it, that he had never delivered it to any person, and verily believed it had been by accident destroyed: it was held that this was proper evidence to go to the jury to prove the destruction or non-existence of the note. The circumstances in this case, that more than four years had elapsed from the time the note fell due before the trial,—that the controversy between the parties was notorious, and that there had been two former trials of the same action, were held to be entitled to great weight in the consideration of the question as to the destruction of the note.]

On a judgment by default in an action upon a bill or note, no (54) evidence need be given. (*v*)

The Court (55) will, therefore, upon such judgment, even in assumpsit, if the bill or note be for the payment of British money, refer it to an officer to ascertain the sum due for principal, interest, and costs, and give the plaintiff final judgment without a writ of inquiry.

And if the bill or note be lost pending the action, they will refer it on a verified copy. (56)

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(54) Bevis v. Lindsell, Str. 1149. On executing a writ of inquiry in an action on a note, the plaintiff did not produce the subscribing witness, but offered other evidence that it was the defendant's hand, and the Court held *that* sufficient; "for, the note being set out in the declaration, is admitted, and the only use of producing it is, to see whether any payment is endorsed upon it."

Mills v. Lyne, B. R. Hil. 26 Geo. 3. On a writ of inquiry in an action upon a note, the sheriff directed the jury to give nominal damages only, because the plaintiff could not prove the note. Lawrence insisted that the plaintiff was bound to produce the note (because a receipt of part might have been endorsed thereon), and to prove the defendant's signature; but the Court set aside the inquisition.

Green v. Herne, 3 Term Rep. 301. Upon a rule nisi to set aside an inquisition against the acceptor of a bill of exchange, it was urged that the bill, though *produced* before the jury, was not *proved;* but the Court held that, by suffering the judgment, the defendant admitted the acceptance of the bill, and that he was liable to its amount; and Buller J. said, "the only reason of producing the bill is, to see whether any part of it is paid."

[(*v*) But the note itself must be produced, or its absence accounted for, though it is not necessary to prove the note. And if a note be produced varying from the declaration, the plaintiff will not be allowed to prove that the variance was occasioned by mistake, and that the note produced was the one intended to be described in the declaration. Sheehy v. Mandeville, 7 Cranch, 208.]

(55) Shepherd v. Charter, 4 Term Rep. 275. The defendant having suffered judgment by default in an action on a bill, the plaintiff obtained a rule to show cause why it should not be referred to the master, to compute what was due for principal and interest. The rule was opposed upon the general ground that a reference in such cases was improper; but the Court thought otherwise; and Grose J. observed, that the judges in the Common Pleas gave the case before them great consideration before they referred the question to one of the prothonotaries; and the rule was made absolute. The same had previously been done in Rashleigh v. Salmon, 1 H. Bl. 252; Andrews v. Blake, 1 H. Bl. 529, Longman v. Fenn, 1 H. Bl. 541; and it is now every day's practice in the King's Bench and Common Pleas, but not in the Exchequer. Vide Chilton v. Harborn, 1 Anstr. 249.

(56) Brown v. Messiter, antè, p. 417. n. (83).

But the (57) Court will not refer it, if the bill or note be for the payment of foreign money.

Nor will they refer it, to ascertain the amount of (58) charges and expenses; nor direct the allowance of (59) re-exchange upon a foreign bill.

And though the action be, in fact, brought to recover the money due upon a bill or note, yet the Court will not refer it to the officer (60), unless the bill or note be stated in the declaration.

Nor will the Court make such reference, in an action of debt brought on a (61) judgment recovered on a bill or note.

Where one count in the declaration is on a bill or note, and the defendant demurs to that count, and judgment is given for the plaintiff, the Court (62) will refer it to the officer to as-

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(57) Maunsell v. Lord Massareene, 5 Term Rep. 87. The Court discharged a rule nisi for referring it to the master to compute principal, interest, and costs, upon a bill of exchange; because the bill was for the payment of 200*l.* Irish money. See also Napier v. Schneider, below, n. (59).

(58) Goldsmid v. Taite, 2 Bos. & Pull. 55. On a rule to show cause why a bill of exchange should not be referred to the prothonotary to compute principal, interest, exchange, re-exchange, charges, expenses, and costs, it was objected that charges and expenses were not matter of mere computation; and the counsel for the rule consenting to strike out those words, the Court made the rule absolute. But as to re-exchange, see the next note.

(59) Napier v. Schneider, 12 East's Rep. 420. A bill was drawn in Scotland upon and accepted by the defendant in England, and on motion to refer it to the master to compute principal, interest, and costs on this bill, the Court was prayed to direct the master to allow re-exchange; but this they refused, saying that they would not refer it to the master to try foreign customs and facts, but only to compute what was due upon the bill itself. They therefore granted the rule in the common form.

(60) Osborne v. Noad, 8 Term Rep. 648. The declaration contained only counts for goods sold, and work and labor, and the common money counts. On judgment by default, the plaintiff obtained a rule nisi to refer it to the master to compute principal and interest on two notes; and in support of the rule, an affidavit was produced, stating that the action was brought to recover the amount of these notes, and that such amount was recoverable under the money counts. The Court however said that the rule was confined to cases in which it appeared by the declaration that the action was brought on the notes or bills. Rule discharged.

(61) Nelson v. Sheridan, 8 Term Rep. 395.

(62) Duperoy v. Johnson, 7 Term Rep. 473. The declaration contained many counts, one of which was on a bill; to that there was a

certain what is due for principal, interest, and costs, on that count, though there be other counts on which the parties are at issue.

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demurrer, on which the plaintiff had judgment; to the others there was a plea, on which issue was joined: a rule nisi was obtained to refer it to the master to compute principal, interest, and costs on the bill; and on showing cause against this rule, it was urged that the plaintiff ought either to have waited for the result of the trial of the issue on the other counts, or to have entered a nolle prosequi as to those counts. In support of the rule, Fleming v. Langton, 1 Str. 532, was cited; and the Court thought that case decisive of the present, and made the rule absolute.

See Tidd's Practice, 5th ed. 569, stating that a nolle prosequi must be entered on the other counts; but that such entry need not be made *before* the reference to the master; that it is sufficient if done at any time before final judgment.

CHAP. XII.

Defence to an Action on a Bill or Note.

Bargain for Renewal or Indulgence at the time a Bill or Note is given or endorsed.
Similar Bargain afterwards.
Transfer for a special Purpose only.
Where the Plaintiff is an Agent or Trustee.
Agreement to receive less than the amount of the Bill or Note.
Fraud,
Transfer after Insolvency of Holder, or after tender to him, is not.
Want or Insufficiency of Consideration.
——————— by whom to be insisted on.
Peculiarity of Consideration, such that Plaintiff cannot recover unless he stood in a particular Situation.
Illegality of Consideration.
——————— in Bills or Notes for which others are substituted.
Illegality of Consideration, by whom to be insisted on.
Want of caution in taking the Bill or Note, where it has been lost or stolen, or improperly obtained.
Indulgence.
What Defence, to be pleaded specially.

One species of defence, sometimes attempted upon a bill or note, is, that there was some bargain, when the bill or note was given or transferred, for a renewal or indulgence, or for exempting particular parties from being sued.

But, it is a settled rule that no such defence can be supported by oral evidence, where it is inconsistent with the tenor of the bill or note. (1)

(1) Woodbridge v. Spooner, 3 B. & Ald. 233. Action against executors, on note payable on demand for value received: evidence was

Thus, upon a bill or note payable at a specified time, parol evidence of a bargain when it was issued, that it was not to be paid till A. S. should die, or certain estates should be sold, is inadmissible. (*t*)

[So parol evidence cannot be received in an action on a note, that the defendant was not to be called on for the principal as long as he paid the interest punctually, and that he had paid the interest punctually. (*a*)

So in an action by the payee against the maker of a note, evidence cannot be received of a parol agreement made when the note was given, that, upon the defendant's giving a deed of real estate to the plaintiff, the note should be given up. (*b*)

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received, that, at the time the note was given, it was agreed it should not be payable till after the maker's death, and should then be in nature of a legacy; and on that ground, nonsuit; but, on rule nisi to enter verdict for plaintiff, and cause shown, the whole court held the evidence should not have been received; because, it imported a different bargain and agreement from what the note expressed: and rule discharged.

Free v. Hawkins, 8 Taunt. 92. In an action upon a note by endorsee against endorser, defendant insisted upon want of notice of the dishonor; plaintiff offered parol evidence that at the time the note was given, and defendant (who only lent his name) endorsed it, it was understood that payment was not to be required until certain estates of the maker were sold, and then only in case they did not produce sufficient, and that therefore the defendant knew the note had not been honored. Gibbs C. J. rejected the evidence, and nonsuited the plaintiff; and on a rule nisi for a new trial, the court held the evidence rightly rejected, because it contradicted the note, and the rule was discharged.

Rawson v. Walker, 1 Stark. 361. In an action by the payee against the maker, on a note payable on demand, defendant offered parol evidence, that it was given for goods sold to a bankrupt by his assignees, and that defendant was not to be called upon, unless his allowance under the commission should not be sufficient to pay the amount. Per Lord Ellenborough, "I am ready to admit evidence to show the consideration illegal; but, I cannot receive parol evidence inconsistent with the terms of the note; upon a note payable on demand, parol evidence to show it was not to be payable upon demand, but on a contingency only, is not admissible." Verdict for plaintiff.

Same point, Campbell v. Hodgson, Gow, 74.

[See also Renner v. Bank of Columbia, 9 Wheat. R. 587.

It is held in many American cases that in an action against an endorser, parol evidence is not admissible to contradict or vary the legal effect of the endorsement. Field v. Nickerson, 13 Mass. R. 138; Seaver v. Cunningham, 1 Cowen, 387; the opinion of Bronson J. in Bishop v. Dexter, 2 Conn. R. 422; Price v. Perry, 2 S. Car. R. 31; Rugely v. Davidson, 2 S. Car. R. 33. See also Dow v. Tuttle, 4 Mass. R. 414.]

[(*a*) Trustees &c. in Hanson v. Stetson, 5 Pick. 506.]

[(*b*) Spring v. Lovett, 11 Pick. 417.]

So in an action against the endorser of a note, evidence cannot be received of a parol agreement by the plaintiff with the defendant, that he should not be held as endorser. (*c*)

So in an action by the payee against the maker of a note, expressed to be "for value received by my late husband," parol evidence is not admissible to show that it was given as indemnity against liabilities incurred by the payee for the husband, and that the payee had not been damnified. (*d*)

So parol evidence is inadmissible to show that a note in terms absolute, was payable on condition. (*e*)

But it is held that such evidence may be received of an agreement entered into at the time of making the note, to receive payment of the note in a different way from that expressed in it. (*f*)

In an action on a note payable on demand or immediately, parol evidence cannot be received that it was to be paid at a future day. (*g*)]

So, upon a general endorsement of a bill or note, the like evidence of a bargain at the time of the endorsement, that the bill should be renewed, cannot be received. (2)

[(*c*) Bank of the United States v. Dunn, 6 Pet. S. C. R. 51. Hill v. Ely, 5 Serg. & Raw. 363, is contra.]

[(*d*) Ridout v. Bristow, 1 Crom. & Jer. 231.]

[(*e*) Farnham v. Ingham, 5 Verm. R. 514; Foster v. Jolly, 1 Cromp. Mee. & R. 703.]

[(*f*) Farnham v. Ingham, 5 Verm. R. 514.]

[(*g*) In an action brought in New York on the following note, "I promise to pay Samuel Thompson eighty dollars, Montego Bay, Ap. 21, 1807," it was held, that the note was payable immediately, and being made in Jamaica, parol evidence was not admissible that it was to be paid in New York. Kent C. J. delivered the opinion of the court. "The time of payment is part of the contract, and if no time be expressed, the law adjudges that the money is payable immediately, and the parol proof went to alter in a very material degree its operation and effect, by making it not payable, until some distant and undefined period when the parties should arrive in New York." Thompson v. Ketcham, 8 Johns. R. 146. S. P. Moseley v. Hanford, 10 B. & C. 729.]

(2) Hoare v. Graham, 3 Campb. 57. Endorsee against payee of a note payable two months after date. Defence, that defendant refused to endorse unless plaintiffs would agree that the note should be renewed when due, and that plaintiff acceded to that condition: sed per Lord Ellenborough, "I cannot admit this evidence; it is inconsistent with the written instrument: I will receive evidence that the note was endorsed to plaintiffs as a trust; there may, after a bill is drawn, be a binding promise for a valuable consideration to renew it; but, if the

But, parol evidence of a bargain after a bill or note was given or transferred, will be admissable; and the bargain if there be a sufficient consideration to support it, will be binding. (2)

Where the ground of defence is an engagement to renew, it will be incumbent on the defendant to show that he has taken the proper steps towards such renewal. (3)

[In an action against one joint maker of a note, parol evidence is admissible to show that he was only a surety of the other maker, and that the plaintiff knowing this fact, had given time to the principal for payment without his consent or knowledge. (*h*)

In an action on a bill or note against an endorser, it is no defence that the plaintiff had made an arrangement with a subsequent endorser to proceed against the defendant in the first instance. (*i*)]

It is a defence to an action on a bill, that it was passed to plaintiff by the first endorser for the special purpose of its getting it discounted for the first endorser, and that instead of so doing he claimed to hold it for a debt owing to him by the second endorser. (4)

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promise be contemporaneous with the drawing, the law will not enforce it; it would be incorporating with a written contract an ambiguous parol agreement." Verdict for plaintiff.

[After a note made by A. Winship to J. Winship became due, a consideration of A. W.'s becoming a surety for J. W. in a bond, J. W. agreed that a balance should remain unpaid upon the note for A. W.'s security, which should not be claimed by J. W. if A. W. was obliged to pay the bond. J. W. became bankrupt, and A. W. afterwards paid the bond. In an action by J. W.'s assignee against A. W. on the note, it was held that the above facts were a good defence for the amount paid on the bond. Parker C. J. delivering the opinion of the Court, said, "The agreement is not inconsistent with the written contract, it being made subsequently, and after the contract was broken by non-payment." Ward v. Winship, 12 Mass. R. 481.]

(3) Gibbon v. Scott, 2 Stark. 286. In an action by drawer against acceptor on a bill for the freight of a chartered ship, the defence was that plaintiff had engaged to renew the bill if the charterer did not return before the bill was due; but no application appearing to have been made to plaintiff to renew, Lord Ellenborough thought the defence failed, and the plaintiff had a verdict.

[(*h*) Grafton Bank v. Kent, 4 N. H. R. 221.]

[(*i*) Farmers' Bank v. Yarmeter, 4 Rand. 553.]

(4) Delaunay v. Mitchell, 1 Stark. 429. E. Clewer held a bill pay-

[So if a bill be drawn and accepted for the special purpose of having it discounted in order to raise money on it for the acceptor, and be left in the hands of the drawer, and he passes it to another person for a valuable consideration, for his own purposes, the party receiving it knowing of the drawer's want of authority to dispose of the bill,—the acceptor may maintain trover for the bill against the party so receiving it—who of course could maintain no suit on it against the acceptor. (*k*)

So where a note was endorsed by the payee for the accommodation of the maker, in order to enable him to renew a previous note in a bank, made and endorsed by the same parties, and the bank refusing to receive it, the maker transferred it as collateral security for another debt which he owed, it was held that the creditor who received it could maintain no action against the endorser, as the transfer was a fraud on the endorser, and the creditor, though he had received it in good faith, and for a valuable consideration, had not received it in the ordinary course of business. (*l*)

So where a note endorsed for the accommodation of the maker, for the purpose of having it discounted at a bank, in order out of its proceeds to pay certain demands against the maker, on which another person was surety, was delivered to the surety, who knew the facts, for him to get it discounted, and the bank refused to discount it, it was held that the endorser was not liable on the note to the surety. (*m*)

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able to herself or order, and endorsed first by herself, and secondly by her son: to prevent a commission against her son, she delivered the bill to plaintiff, that he might get it discounted for her; he did not get it discounted, but insisted on holding it for a debt the son owed him, and sued the acceptor; but Lord Ellenborough thought it clear he could not maintain the action, and directed a nonsuit.

[(*k*) Evans v. Kymer, 1 B. & Adol. 528.)

[(*l*) Wardell v. Howell, 9 Wend. 170.]

[(*m*) Kasson v. Smith, 8 Wend. 437.

A case in Vermont, somewhat similar to that in the text, appears to have been differently decided. Beach, as surety for Beaman & Clark, signed a note with them payable to the Burlington Bank. The bank refusing to discount it, Beaman & Clark procured money upon it of Wood & Co., without Beach's consent. It was held that an action might be maintained on the note, in the name of the bank, for the benefit of Wood & Co. Bank of Burlington v. Beach, 1 Aikins, 62.]

So where a note made by two persons was received by the payee for him to get it discounted at a particular bank, on specified terms, part of the money received on it to go to one of the makers, and the remainder to be retained by the payee on account of a debt due to him from the other maker, and the bank refused to discount the note; it was held that an endorsee of the payee who sued for the payee's benefit, could not maintain an action upon the note against the makers. (*n*)

But where a note is made "payable and negotiable" at a particular bank, it is no defence to an action against the maker by an endorsee, that the note had been negotiated, not by the bank, but by individuals, the maker himself having put the note into circulation. (*o*)

It is a good defence to an action against the endorsee of a note, that the holder, who had received it from the maker, knew at the time of receiving it that the maker had no right to transfer it. (*p*)

But where a note was made by a debtor, and signed by another person with him as surety, for the purpose of getting money on it at a bank, in order to discharge a particular debt, and the bank refused to discount the note, it was held that the creditor, for whose benefit the note was made and to whom it was given, might with the assent of the bank bring an action upon it in the name of the bank against the makers. (*q*)

So where a note, signed by one person as principal and

[(*n*) Dennistoun v. Rogers, 10 Johns. R. 207.]

[(*o*) Wardell v. Hughes, 3 Wend. 413.]

[(*p*) Warren endorsed a note for the accommodation of the maker, for them to raise money on it, but they becoming insolvent with the note in their hands, he directed them not to part with it. They however passed it to Skilding and Haight for a valuable consideration, not informed them at the time of the above facts. It was held that Skilding and Haight could not maintain an action against Warren as endorser. Spencer C. J. giving the opinion of the Court, said, "The plaintiffs are *mala fide* holders of the note, and they took it with a view to charge a person who had endorsed it to aid men who were in good circumstances, but who became insolvent. The plaintiffs were warned that the note was *functus officio*, and yet they took it." Skilding v. Warren, 15 Johns. R. 270.]

[(*q*) Utica Bank v. Gunson, 10 Wend. 314.

A contrary decision has been made in Indiana in a very similar case. Bank of Indiana v. Ross, 1 Ind. R. 315.]

another as surety, was made payable to a bank for the purpose of having it discounted by the bank, and the principal, the bank refusing to discount it, passed it to a third person as security for a debt due to him from the principal, without the surety's consent; it was held that the surety was liable on the note in a suit brought in the name of the bank for the benefit of the person to whom the principal had pledged it. (*r*)

It is no defence to an action on a bill or note, that the defendant endorsed it for the accommodation of the maker or drawer, and that he applied it to secure an antecedent debt due to the plaintiff, where the endorsement was made without any limitation or restriction as to the mode in which the bill or note was to be used. (*s*)

In an action on a note against an endorser, it is no defence that he endorsed the note for the accommodation of the maker, and that it was intended to be discounted at a particular bank, but that the maker, the bank refusing to discount it, had it discounted by A. B., who knew these circumstances. (*t*)

[(*r*) Bank of Rutland v. Buck, 5 Wend. 66. The principal having received the note for a special purpose, viz. to have it discounted by the bank, could he make the surety liable on it when he employed it for another purpose? The following case seems somewhat to conflict with that in the text:—A person endorsed a note payable in 60 days for the accommodation of the maker, in order to enable him to get it discounted at a bank. The bank having refused to discount the note, the maker, when it had but eighteen days to run, passed it off in the purchase of lottery tickets at the retail price, the vendor knowing that he was not a dealer in tickets, and that the note had been in the bank, and the bank marks being upon it. It was held that an action brought by the lottery ticket vendor against the endorser could not be maintained, as the passing the note to him was a fraud against the endorser, and he received it under circumstances which were sufficient to have put him on inquiry. Brown v. Taber, 5 Wend. 566. It is not easy to reconcile this case to that of the Rutland Bank v. Buck. In both cases the note was made to be discounted by a bank, and in both cases they were employed by the maker in a different manner; and in both cases the maker was benefited by them. As the purchase of lottery tickets was not illegal, is there any distinction between the cases?]

[(*s*) Grandin v. Le Roy, 2 Paige, 509.]

[(*t*) Powell v. Waters, 17 Johns. R. 176. Spencer C. J. giving the opinion of the Court, said, "It was entirely immaterial whether the first note was discounted at the Bank of Newburgh or elsewhere. It did not alter or increase the responsibility of the endorser. If the plaintiffs knew when they received the note, that it was intended to be discounted at the Bank of Newburgh, and had been refused, it would not affect them, or establish any fraud."]

In an action by the holder of a bill or note against any party to it, the defendant may prove that the plaintiff holds it as agent or trustee of another person, and that the party really interested has requested or directed the defendant not to pay it to the plaintiff. (*s*)

In an action on a bill, the declarations of an endorser are evidence for the defendant, if it appear that it was endorsed without consideration, and that the plaintiff acts merely as the agent of the endorser. (*t*)

In an action against A. and B. two joint makers of a note, a plea by A. of an agreement by the payee when the note was made, that A. should only be held to pay a certain sum upon the note less than the full amount of it, and that he had paid that amount, has been held bad on demurrer. And it is immaterial whether the agreement is verbal or written. (*u*)

It is a defence to an action on a note that it was fraudulently put in circulation by the maker, where the action is brought by one who is a party to the fraudulent transfer, but not where it is brought by a bonâ fide holder for a valuable consideration, who received it before it was due. (*v*)

Where the holder of a note obtains it by fraud, he cannot maintain an action upon it against any party to it, even though the party sued would be liable on the note to the party from whom it was fraudulently obtained. (*y*)

Though it is no defence in an action against a party to a note that the holder gave no consideration for it, if the party from whom he received it could have sued the defendant on it, yet such want of consideration may be received in evidence

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[(*s*) Barker v. Prentiss, 6 Mass. R. 430. The agency may be proved by parol evidence. S. P. Comstock v. Hoag, 3 Wend. 168.]

[(*t*) Welstead v. Levy, 1 Mood. & Rob. 138.]

[(*u*) Shed v. Pierce, 17 Mass. R. 623. Parker C. J. giving the opinion of the Court, said, "The agreement is in direct contradiction to the promise contained in the note; and whether in writing or merely verbal, we think, cannot be set up against the note. Being posterior to, with the express terms of the contract, and relating to one only of the promisers, it ought not to defeat the action against the other; nor will it if it should be held a good bar."]

[(*v*) Vallett v. Parker, 6 Wend. 615.]

[(*y*) Putnam v. Gibson, 1 Hall, 308.]

with other circumstances to show fraud in the holder in obtaining the note. (*y*)

Where the maker of a note signed a new note as surety for the endorser, in order to enable the latter to raise money upon it to take up the first note, which had become due, the endorser undertaking to return the old note when it was taken up, and the endorser accordingly raised money on the new note and therewith took up the first note, but instead of returning it to the maker, negotiated it to a third person; it was held in Massachusetts, that the person so receiving the old note might maintain an action on it against the maker. (*z*)

[(z) Eaton v. Carey, 10 Pick. 211. This was assumpsit on a note, dated March 11, 1828, payable to Joshua U. Bartlett or order, in thirty days, and endorsed in blank. It appeared in evidence at the trial that the note was made at Bartlett's request, to raise money for his use, Carey at the time taking from Bartlett a note for the same sum payable at the same time. Bartlett raised money on Carey's note by pledging it. After it was due, Carey signed a new note as surety for Bartlett, in order to enable him to raise money to redeem the note in suit, which he was to return to Carey. Bartlett raised the money on the new note and redeemed the old note, but instead of returning it to Carey, pledged it to the plaintiff on a loan for $40. Carey, on May 28, 1828, sued Bartlett on the note given by Bartlett to him and account. The judgment was partly satisfied, but more remained due on it than was due on the note in suit, at the time of the judgment. Bartlett was insolvent. A default was entered, subject to the opinion of the Court. The Court thought the note given by Bartlett to Cary was a good consideration for the note in suit given by Carey to Bartlett. The Court also thought that the note in suit was not paid by Carey or with his money, that the money raised on the new note was Bartlett's money, notwithstanding Carey was his surety. "The note, the Court said, was taken up by him [Bartlett] as promisee and endorser. But it is well settled, that one who takes up a note as endorser, may either sue the promiser for money paid, or endorse the note in such manner as to charge the promiser at his election, and though thus negotiated when overdue, the endorsee may maintain an action against the promiser or other prior parties who may be chargeable. Guild v. Eager, 17 Mass. R. 615. This payment to Mills, having been made by Bartlett, the endorser, he might well transfer it to the plaintiff, though overdue at the time, and the plaintiff's action upon it, is well maintained."

The reasoning of the Court in this case is not quite satisfactory. It is true the note was given for a good consideration. But after Carey had become surety for Bartlett in a new note, made for the express purpose of raising funds to take up the note in suit, which, when it was paid, was to be returned to Carey, and Bartlett had taken up the note in suit by means of the new note, did not Bartlett then hold the note in suit in trust to return it to Carey, and could he rightfully make any other use of it? It was evidently the understanding between Carey and Bartlett, that Carey should assume the liability as surety on the

It is no defence to an action on a note against the maker that he tendered payment to the holder before the note became due, and that the holder afterwards and before the note was due, being insolvent, transferred it to the plaintiff, who knew the circumstances, in payment of a debt; for the tender had no operation, being made before the note was due, and the holder had a right to transfer the note. (*a*)

Nor is it any defence to such an action that the holder, being insolvent and owing a debt to the maker of the note, which he could offset in a suit by the holder on the note, the holder transferred the note before it became due to the plaintiff, who knew the circumstances, in payment of a debt; for the maker, by giving a negotiable instrument, authorizes such a transfer. (*a*)

Nor is it any defence in such an action, that a bank which had discounted the note, gave its own notes for the note, when it was in failing circumstances, and destitute of funds to redeem them, and refused to take the same notes back again in payment of the discounted note, and the plaintiff knew these facts when the note was endorsed to him, even if the maker of the note in suit still holds the bank notes. (*a*)

In an action against the endorser of a note, it is no defence that the holder had, in a suit against the maker, written over the name of a prior endorser, an order to pay it to himself, the names of the subsequent endorsers not being struck out. (*b*)]

Another species of defence to an action in respect of a bill or note, is (5) want or inadequacy of consideration for giving or transferring it..

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new note, instead of his liability on the note in suit. Could Bartlett therefore himself have sued Carey on the note in suit, before relieving him from his liability on the new note? If Bartlett himself could not sue, the endorsee to whom he passed it stood in the same predicament.]

[(*a*) Tillon v. Britton, 4 Halst. R. 120.]

[(*b*) Cole v. Cushing, 8 Pick. 48.]

(5) Jefferies v. Austen, Str. 647. In an action by the payee of a note against the maker, Eyre C. J. of the Common Pleas, allowed the defendant to prove, that it was given as a reward in case the plaintiff procured the defendant to be restored to an office, and that the defendant was not restored; and on this proof the defendant had a verdict.

A total failure of consideration is, where it can be insisted upon, a total bar: inadequacy, or a partial failure, a bar pro tanto only. (6)

Jackson v. Warwick, 7 Term Rep. 121. The defendant's son was apprenticed by indenture to the plaintiff; and the defendant gave the plaintiff a note for 10*l.* as an apprentice fee; but this premium was not mentioned in the indentures, nor were they stamped pursuant to 8 Ann., c. 9. The son remained part of his time, and then absconded. In an action on the note, and the failure of consideration (the apprenticeship) relied on as a defence, it was contended that the avoiding the indentures could not collaterally affect the note, and that at all events the consideration had not wholly failed, inasmuch as the plaintiff had maintained the apprentice during his stay. Lawrence J. however, thought that the consideration was entire, and had wholly failed; but he allowed a verdict to be taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit. The Court concurred in opinion with Lawrence J., and directed a nonsuit to be entered.

(6) Barber v. Backhouse, Peake, 61. In an action on a bill of exchange by the payee, the defendant paid part of the money into court, and it appeared upon the trial that there was no consideration for the other part. Law, however, urged that the payment of the money into court admitted the bill was good for part, and if it were good for part, it was good in toto; but Lord Kenyon declared himself clearly of a contrary opinion, upon which the jury found for the defendant; and this case being afterwards mentioned by Lord Kenyon in the course of argument, Law said he was perfectly satisfied with the decision.

Ledger v. Ewer, Peake, 216. In an action by the payee of a bill against the acceptor, the consideration appeared to be that the plaintiff had taken the defendant into partnership; but on the defendant's friends' advice he broke off the connexion. There was evidence of fraud on the plaintiff's part in drawing the defendant into the engagement, which Lord Kenyon left to the jury; but he told them if they were against the defendant on the evidence of fraud, they should take into consideration the damages the plaintiff had really sustained by the non-performance of the contract, and were not obliged to find the whole amount of the bill; the jury, however, found for the defendant.

[See Coupy's Heirs v. Dufan, 13 Martin, 90. The defence of want of consideration may be made out by parol evidence.

It has been held in Massachusetts that where a note is given without any consideration, being a voluntary promise of the maker intended for the benefit of the payee, it is good against the maker and his representatives. See Bowers v. Hurd, post.

A. owing B. $500, payable at a future day, advanced $190 as part payment, taking from B. a note for $190 payable one day after date, on a parol agreement that the note should be merely evidence that B was to allow interest on the $190 until the $500 should be payable. Held that this parol agreement was not void as intending to vary a written one, but between the original parties would defeat a recovery on the note, as showing it to be without consideration. Slade v. Halsted, 7 Cowen, 322.

A note, though expressed to be for value received, may be avoided in an action by the payee against the maker, by proof of a want of

Thus, in an action against an acceptor, it is a good defence,

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consideration. Russell v. Hall, 20 Martin, 558. And a new note given in renewal of the one so voidable, is likewise without consideration and voidable. Hill v. Buckminster, 5 Pick. 391.

It has been held in Maryland that a note given by a member of the vestry of a church, for a debt due by the vestry, a corporate body of which he was a member, without any consideration moving to himself, was a promise to pay the debt of another, without consideration and void, although the note was payable at a future day, and was made for the purpose of closing an account against the vestry. Rogers v. Waters, 2 Gill. and Johns. 64.

Livingston owing Maule a large sum, and Maule holding land for Livingston's use, Maule conveyed the land to Winter, on his becoming security for Livingston's debt to Maule. By an agreement between Winter and Livingston, Livingston made his notes to Winter, and Winter agreed to convey the land to him on payment of the notes, but this agreement to be void if Livingston did not pay his notes as they fell due. He did not pay them as they fell due, and Winter exercised acts of ownership over the land by selling parcels of it, &c. It was held that Winter could not maintain an action against Livingston on the notes, on account of the failure of the consideration. Per Curiam. "Livingston has received nothing for his notes, and Winter has a complete and perfect title to the lands." Winter v. Livingston, 13 Johns. R. 54.

In an action by Shepard against Hawley and Loomis, as endorsers of a note, it was held to be a complete defence to the action, that Shepard, holding Loomis' drafts on Ward, agreed to return them, on receiving certain notes, and among others that in suit, which were accordingly given him, but that he refused to deliver up the drafts—that Shepard received part of the money of Ward, and gave him a receipt in full, erased the acceptances,—and three months after the notes were received, offered to return the drafts in that state to Loomis, who refused to receive them. Shepard v. Hawley, 1 Conn. R. 367.

It was held, in a subsequent case, that Shepard could not maintain an action against the maker of one of the notes mentioned in the preceding case. Shepard v. Hall, 1 Conn. R. 494.

Where after non est inventus returned on the *ca. sa.* against the principal in a suit, the bail gave his note for the amount of the judgment, and the judgment against the principal was afterwards reversed on a writ of error, it was held that the consideration for the note of the bail had failed, and that no action could be maintained upon it. Tappen v. Van Wagenen, 3 Johns. R. 465.

A note given to aid a fund for support of the parish minister was held to be void for want of consideration. Boutell v. Cowdin, 9 Mass. R. 254.

There is no difference between a *failure* and a *want* of consideration for a bill or note. Either may be given in evidence against the payee or an endorsee with notice. Le Blanc v. Sanglar, 12 Martin, 402.

In an action on a note given for the price of goods sold with a warranty as to quality, it is no defence of itself that they turned out to be of no value. And in such a case a return of the goods is necessary to make out the defence. Shepherd v. Temple, 3 N. H. R. 455.

In an action on a note given for a subscription to the funds of a col-

either wholly or in part, that the acceptance was either wholly or in part for the accommodation of the plaintiff (7);

Or of some person for whom the plaintiff is trustee. (8)

Where a bill is accepted partly for money due from the acceptor to the payee, and partly for money due from J. S. to the payee, and the foundation of the acceptance as to J. S.'s debt is known to the payee to be money the acceptor has in his hands, as receiver of real estates of J. S.'s wife, and the payee afterwards agrees to indemnify the acceptor, as to the latter sum, against any proceedings for it by J. S. and wife; if J. S. and wife afterwards insist upon having that money, and the acceptor pay it them, the acceptor may resist any demand for that sum by the payee. (8*)

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lege, by the payee against the maker, the same defence is admissible, as if the action had been for the subscription. And where a note was given for half the amount of principal and another for half the amount of interest on a subscription, and the college thereupon discharged the subscriber, it was held that he was not liable on the notes, unless he understood the full grounds of his defence, when he made the settlement. Middlebury College v. Williamson, 1 Verm. R. 212.

See also Byrd v. Craig, 13 Martin, 625; Kellogg v. Curtis, 9 Pick. 534; Barnum v. Barnum, 9 Conn. 242.]

(7) Darnell v. Williams, 2 Stark. 166. Payee against acceptor on bill for 19*l.* 12*s.* Defendant proved that he had value for 10*l.* only, and that he accepted for the rest to accommodate the plaintiff: and per Lord Ellenborough, "Though this, as to third persons, is a bill for 19*l.* 12*s.*, yet as between these parties the acceptance is for 10*l.* only;" and that sum having been paid before the action, he nonsuited the plaintiff.

(8) Jones v. Hibbert, 2 Stark, 304. Defendant accepted a bill for 41*5l.* to accommodate Philips and Co.: Philips and Co. endorsed it to their bankers for value, and became bankrupts: the bankers knew it to be an accommodation acceptance, and their demand against Philips and Co. was 26*5l.* only: in an action by them upon this acceptance, it was held that they could only recover the 26*5l.*; and they had a verdict accordingly.

(8*) Carr v. Stephens, 9 B. & C. 758. Plaintiff had a claim upon defendant for 40*l.*, and upon Harrison for 149*l.* Defendant was receiver of the rents of the real estates of Harrison's wife, and had 300*l.* in hand. Plaintiff drew upon defendant for both these sums, and defendant had Harrison's concurrence, but not his wife's, for accepting the bill: before the bill became due, Harrison and wife insisted that the money should be paid to them: plaintiff agreed to indemnify defendant against any proceedings for the money by Harrison and wife, but defendant afterwards paid their agent, and refused to pay plaintiff; plaintiff sued defendant, and defendant paid into court what would cover the 40*l.* Lord Tenterden thought him bound to pay the whole, and to resort to his indemnity, but saved the point; and on rule nisi for nonsuit, and cause shown, he changed his opinion, and the rule was made absolute.

He is not bound to pay his acceptance, and then resort to his indemnity. (8*)

Where an action is brought by several plaintiffs against an acceptor, it is a sufficient defence, that the acceptance was given to accommodate one of them, and that he was to have provided money to pay it. (9)

So, where a bill or note is given, either wholly or as to a specific part, as the consideration of a special contract, and that contract either fails in toto or is in toto rescinded, it will be an answer to an action on the bill or note, either wholly or pro tanto, if the plaintiff stand in a situation which makes him liable to such a defence. (10)

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(9) Sparrow and others v. Chismon, 9 Barn. & Cr. 241. Action by plaintiffs as endorsees of two bills for 1500*l.* each, drawn by Peckover, one of the plaintiffs, against defendant as acceptor. It appeared that defendant lent his acceptances to accommodate Peckover, and that Peckover engaged to pay them. A verdict being found for plaintiffs, rule nisi for new trial, on the ground that as Peckover was to have provided for the bills, he was precluded from joining in an attempt to enforce payment from defendant; the three Judges were of that opinion, and the rule was made absolute.

(10) Lewis v. Cosgrave, 2 Taunt. 2. This was an action on a banker's check drawn by the defendant, and given to the plaintiff for the price of a horse sold by the plaintiff to the defendant, and warranted sound. The horse was, in fact, unsound, and that was relied on as a defence. The defendant proved that he had sent back the horse, but the plaintiff refused to take it; he, however, sent it again, and left it in the plaintiff's stable without his knowledge. Heath J. told the jury that as the plaintiff had refused to receive back the horse, the contract for the sale was not rescinded, and that the defendant was, therefore, bound to pay the check, and had his remedy by action for the deceit. They found a verdict for the plaintiff; but, on a rule nisi for a new trial, and cause shown, the court, on the ground of there being clear evidence of fraud, made the rule absolute. See Weston v. Downes, Dougl. 23; Power v. Wells, Cowp. 818; and Towers v. Barrett, 1 Term Rep. 133.

[See also Reed v. Prentiss, 1 N. H. R. 174.

It is a good defence to an action on a note, that it was given in consideration of the assignment of a void patent right from the plaintiff to the defendant. And it seems that the defence is good, although the assignment should contain covenants, on which the defendant might maintain an action against the plaintiff. A note in such a case was held to be void notwithstanding the plaintiff had furnished the defendant with materials, and given him instructions in the art described in the patent, the materials and instructions being of no value to the defendant, except as subservient to the art pretended to be conveyed. Bliss v. Negus, 8 Mass. R. 46.

But it has been held to be no defence to an action on a note given for

the purchase of a patent right, that the invention is useless and of no value. Williams v. Hicks, 2 Verm. R. 36.

In an action on notes given for the price of a shearing machine, it was held that the defendant under the general issue might prove that the plaintiff made certain representations with respect to the usefulness of the machine, which were utterly false, and that known to him at the time, and that the machine was in fact worth nothing and totally useless; and that this evidence proved the note to be without consideration and void, and was a complete defence to the action. Sill v. Rood, 15 Johns. R. 230.

Getman agreed with his slave Tom that if Tom would procure him good notes to the amount of $200, and give his own note for $75, that he would immediately manumit him and his family. Tom procured the notes and delivered them to his master, and among them one made by Christy payable to Petry and not to his order, and by him assigned to Getman to be collected at his own risk. Getman made out an instrument of manumission, and procured a certificate from the overseers of the poor. Getman however kept the papers two years and 5 months, and then gave them to the town clerk to be recorded, and during all that time kept and treated the negroes as his slaves. In an action against Christy upon his note in the name of Petry, the court considered Getman as the real plaintiff, as there was no evidence that the note was ever delivered to Petry; and that there was a failure of consideration, as the agreement of Getman was to manumit the slaves *immediately* on receiving the notes, and he had refused to do so for two years and five months; and that it made no difference whether the manumission was legally consummated or not, without any delivery of the certificate, since Getman's actually holding the negroes as his slaves was a violation of his agreement. Judgment for the defendant. Petry v. Christy, 19 Johns. R. 53.

In an action by an insurance company against the endorser of a note given to secure a premium of insurance, the insurance company having before the suit commenced become liable to pay the insured, who was the maker of the note, a return of part of the premium, it was held that the defendant was entitled to have the amount of the return of premium deducted from the amount of the note, although the maker was insolvent and indebted to the insurers upon other premium notes. Per Curiam. "The consideration for the note was the premium of insurance, and the only question is, what was the amount of that premium. If the plaintiffs are bound to return part, then the premium really and ultimately due, is not as much as it was at first understood to be."—"The surety is no further bound than his principal, and is entitled to the same defence." Phœnix Ins. Co. v. Fiquet, 7 Johns. R. 383.

Stow claiming a certain sum of Wadley on account of an alleged mistake in settling their accounts, which mistake Wadley denied, Wadley made his note for the amount payable to Stow, and lodged it with Ten Eyck, the parties agreeing that if Wadley within 60 days should exhibit Ten Eyck proof from which Ten Eyck should think that Wadley ought not to pay the note, then it should be delivered to Wadley, otherwise it should belong to Stow. Wadley within the sixty days insisted on giving parol evidence to Ten Eyck, which he thinking himself not authorized to admit, returned the papers to Stow. It was held that Stow could not maintain an action against Wadley on the note. Per Curiam. "There was no consideration for the note. Ten Eyck declined to act, and would not receive the parol evidence that the defendant offered. The defendant was not in default, and his default, or a decision of Ten Eyck

[So an error in calculation in the settlement of accounts, for the balance of which a note is given, may be proved in evidence, to show a want of consideration. (*c*)

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against him, was a condition precedent to the validity and binding operation of the note." Stow v. Wadley, 8 Johns. R. 96.

Olmsted made a note payable to E. Stewart or bearer, but at the time of making it informed C. Stewart, to whom the note was delivered as the agent of E. Stewart, that he did not owe E. Stewart so much as the note was given for, that he had mislaid his papers, but that he would give the note, and let it lie until he could find them. In an action on the note by C. Stewart against Olmsted, it was held that the defendant might prove the amount really due from him to E. Stewart, and that that amount was all which could be recovered by the plaintiff. Olmsted v. Stewart, 13 Johns. R. 238.

March 8th, 1810, Dennis of Philadelphia drew a bill upon Liverpool payable to Smith or order, at 60 days' sight. Smith endorsed it in blank, and Dennis handed it to Eddy and Co. to secure a balance supposed to be due by him to them. The bill was not passed to the credit of Dennis by Eddy and Co., but they delivered it to Chancellor to be sent on for collection, and took from him a receipt promising to account for the bill. On the 6th August Eddy and Co. assigned this receipt, *inter alia*, to Evans, on account of a pre-existing debt, Evans knowing nothing of the transaction between the original parties. The bill being returned dishonored, was delivered to Evans, who brought a suit upon it against Smith. A majority of the referees to whom the case was referred, as is usual in Pennsylvania, considered that the bill was not taken by Evans in the usual course of business, and was liable to the same equity in his hands as in those of Eddy and Co., and that of course his right to recover depended upon there being a balance due to that house by Dennis. They awarded in favor of Evans, without particularly examining the accounts, thinking any balance was sufficient to carry the whole bill. Yeates J. "The bill did not go into the hands of the plaintiff in the usual course of business, and seems to me analogous to the case of a promissory note negotiated after it becomes due. The plaintiff then stands precisely on the same footing with Eddy, and is only entitled to the real balance as it stood between the latter and the drawer of the bill." Report set aside. Evans v. Smith, 4 Bin. R. 367.

Where A., a debtor of B., knowing that B. has made an assignment of his effects and demands for the benefit of his creditors, buys of C. a note made by B. at a discount, to enable him to offset it against B.'s demand against him, and pays for it by his own note with an endorser, it has been held that these facts afford a sufficient defence to the endorser on A.'s note in an action by C., the sale of B.'s note being an attempt to defraud the creditors of B. Ritchter v. Selin, 8 Serg. and Raw. 425.

If the vendor of a chattel receives the purchaser's note for the price, and the chattel is afterwards attached as the property of the vendor, and the purchaser brings replevin against the attaching officer, a judgment in favor of the officer, will be a bar to an action by the vendor on the note. Bailey v. Foster, 9 Pick. 139.]

[(*c*) Blakely v. Hampton, 3 M'Cord, 469.]

So if a note is given in pursuance of an award, it may be shown in defence that it had been given for too much in consequence of a mistake of the arbitrators, which they afterwards discovered. (*d*)]

But, the partial failure of consideration will constitute no defence, if the quantum to be deducted on that account be matter, not of definite computation, but of unliquidated damages.

Thus, if a bill or note be given for the stipulated price of goods previously delivered, it is no ground of partial defence that the price was exorbitant (11);

Or that the goods were damaged when they ought to have been sound (12);

Unless the contract were rescinded on that ground. (13)

[(*d*) M'Creary v. Jaggers, 3 M'Cord, 472, note.]

(11) Solomon v. Turner, 1 Stark. 51. In an action by payee of a note against the maker, the defence was that that and another note, which had been paid, had been given as the price of certain pictures, and that the pictures were not worth the amount of the other note: and per Lord Ellenborough, "I will not admit evidence for the purpose of reducing the damages, that the pictures were of inferior value; if by inadequacy of value, and other circumstances, you can prove fraud, so as to show there was no contract at all, the evidence will be admissible; if it fall short of that, it will be unavailable:" it did fall short, and plaintiff had a verdict.

(12) Morgan v. Richardson, 1 Campb. N. P. C. 40. n. To an action by the drawer against the acceptor of a bill, drawn payable to the drawer's order, the defence was that the bill had been accepted for the price of some hams, and that they had proved to be so bad as to be almost unmarketable. The sum for which they were actually sold was paid into court. Lord Ellenborough held, that this partial failure of consideration was no defence to this action, but that the defendant must take his remedy by action. S. P. Fleming v. Simpson, 1 Campb. N. P. C. 40. n. From 2 Campb. N. P. C. 346., it appears that the case of Morgan v. Richardson was afterwards brought before the Court of King's Bench, and that the Court approved of the direction of the Chief Justice.

In Tye v. Gwynne, 2 Campb. N. P. C. 346., the same point again arose in an action by the drawer of a bill against the acceptor, and Lord Ellenborough said that he should certainly adhere to the judgment the Court gave in Morgan v. Richardson.

Vide Broom v. Davis, cit. 7 East's Rep. 480. See also Basten v. Butter, 7 East's Rep. 479, and the cases therein cited.

[See also Reed v. Prentiss, 1 N. H. Rep. 174; Thornton v. Wynn, 12 Wheat. 183.

In the case of Hills v. Bannister, 8 Cowen, 31, the question was discussed, but not decided, whether a breach of warranty of an article

[It is a defence to a note in a suit between the original parties, that the contract in consideration of which it was given has been rescinded. (*e*)

It is a defence to an action on a note given for the price of an article sold, that the property in the article never passed, or that it is of no value. (*f*)

So where a note is given for the price of land, and the title of the vendor wholly fails, this is a good defence to an action on the note, even though the deed contains covenants on which the vendor is liable. (*g*)

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sold, can be given in evidence to reduce the damages, in an action on a note given for the price.]

(13) Lewis v. Cosgrave, antè, p. 534, n. (10).

[(*e*) Benson v. Smith, 2 Miller, 102.]

[(*f*) See Reed v. Prentiss, 1 N. H. Rep. 174; Fowler v. Shearer, infra, and Sides v. Hilleary, 6 Har. & John. 86.]

[(*g*) Where notes were given for the purchase money of land conveyed by the payee to the maker by deed with warranty; and at the time of the conveyance, there was a judgment against the payee, under which the land was afterwards sold and conveyed by the sheriff; it was held, that the payee could maintain no action against the maker of the notes. Per curiam. "The consideration for the note has entirely *failed*; for the defendant has no title, it having been extinguished by the sale under the judgment. Although the defendant has not yet been evicted by the purchaser under the sheriff's sale, he is liable to be so, and will be responsible for the mesne profits. To allow a recovery in this case would lead to a circuity of action, for the defendant on this failure of title would be entitled immediately to recover back the money." Frisbee v. Hoffnagle, 11 Johns. R. 50.

But see Lloyd v. Jewell, infra.

A note given in consideration of a void deed is *nudum pactum* between the parties, and the payee cannot maintain an action on it. Fowler v. Shearer, 7 Mass. R. 14.

Skinner sold land to Lee by a deed with covenants of seizin and warranty, for which Lee paid in part by his notes, one of which was for $1000 payable in three years. Lee was afterwards evicted from the land, by a judgment in favor of a person having a superior title. Dilloway purchased the note above mentioned of Skinner, having, at the time of the purchase, notice that Lee's title was disputed, and that Lee intended to refuse payment of the note if he was evicted from the land. Skinner afterwards died insolvent. In an action by Dilloway's administrator on the note against Lee, it was held that as the defendant could not plead the demand on the covenants by way of set-off, or avail himself of it in a cross action, the above facts were a defence under the general issue; but that the plaintiff might introduce evidence to show that the value of the land at the time of the eviction was less than the amount of the note, and would in such case be entitled to recover the difference. Parker C. J. in giving the opinion of the Court, says, "Without, therefore, determining the general question, whether,

So where the consideration of a note was a promise by the payee to convey to the maker, on payment of the note, a certain tract of land, if the payee should own it, and if not, to buy it of the owner as cheap as he could, and let the maker have it at the cost, and the payee died before the note became due, insolvent, and without any title to the land; it was held that the maker might defend against the note, on the ground that the consideration had failed. (*h*)

But a failure of title to part of the land, or an incumbrance upon it, is no defence to an action upon a note given for the purchase money. (*i*)

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when other sufficient remedies exist, a mere failure of title, when there are covenants of seizin and warranty, will constitute a defence against an action for the consideration, we are all of opinion that in the present case there being no other remedy, it is consistent with every sound principle of justice and law to allow the defence which was offered. The plaintiff may meet this defence by showing that the title was good, or that the land, at the time of the eviction, was worth less than the consideration, and therefore entitle himself to recover the difference; but without evidence to this effect, he ought to be entirely barred of his action. Knapp v. Lee, 3 Pick. 452.]

[(*h*) Tillotson v. Grapes, 4 N. H. Rep. 445.]

[(*i*) In an action on a note by the payee against the maker, it was held to be no defence that the note was given in consideration of a bond from the payee to the maker, conditioned for the conveyance of land, and that the land was then under mortgage, and continued so at the time the action was brought. Smith v. Sinclair, 15 Mass. R. 171.

In an action by the payee against the makers of one of six notes given for land, it was held to be no defence that the deed contained a condition that upon the breach of any of the covenants, the grantor should only be liable to the amount of the consideration expressed in the deed, payable in cash to the amount received on the notes, and the residue by delivering up the unpaid notes; and that the grantor had no title to a part of the land, which part was in the possession of a stranger, and was of greater value than the note in suit, estimating the whole at the price in the deed. Mellen C. J. giving the opinion of the Court, said, "In an action on a note, given for the price of real estate conveyed by the promisee to the promiser, by deed containing the usual covenants of seizin and warranty, the action being between the original parties, a total or partial failure of title, or want of title in the grantor, at the time of the conveyance," is no defence. The Court thought that the special covenants in this case did not render the defence tenable, for the clause relied on was introduced for the benefit of the plaintiff, and reserved no rights to the defendants. Lloyd v. Jewell, 1 Greenl. 352. The Court said that they were inclined to believe, had the defence been admissible against *either* of the notes, the plaintiff might elect to have the damages paid by giving up one of the other notes, three of which were unpaid.

Where a person conveys all his interest in land, without any warranty, it is held in New Hampshire that his having no interest in the land, is no defence to an action on a note given for the price, there being no fraud in the sale. (*k*)

It is no defence to an action on a note given for the price of real estate sold, that the vendor made the sale for the purpose of defrauding his creditors, and whether the vendee was a party to the fraudulent design or not. (*l*)

It is held to be no defence to an action by the payee against the maker of a note, that the payee had agreed to convey an estate to the maker in consideration of a sum of money then paid or secured to be paid to the maker (being the amount of the note,) and of a further sum to be paid at a future day, and that the estate had never been conveyed. (*m*)]

So, it is no answer to an action on a bill or note, that it was given as the condition of a lease to be executed by the plaintiff and of letting the defendant into possession of the premises, and that plaintiff had refused to execute the lease; for, he is not bound to execute till the price is paid; and as the defendant was let into possession, the consideration fails in part only: and the sum to be allowed for such failure is matter, not of mere calculation, but of unliquidated damages. (14)

Although the consideration of a note fail, by reason of the want of title to lands which were agreed to be conveyed to the maker, yet if a new agreement as a substitute for the old one be entered into between the original parties to the note, the failure of the original consideration creates no equity in favor of the maker of the note against an endorsee, even in Virginia; and a court of equity will not relieve against a judgment at law obtained by the endorsee against the maker. Young v. Grundy, 7 Cranch. 548.

Harlan v. Reed, 3 Hamm. 255. The defendant cannot give in evidence, in reduction of damages in a suit, on a note given for the price of a farm, that the plaintiff made a misrepresentation as to the quality of the land.]

[(*k*) Perkins v. Bumford, 3 N. H. Rep. 522.]

[(*l*) Findley v. Cooley, 1 Ind. R. 202.]

[(*m*) Spiller v. Westlake, 2 Barn. & Adol. 155. Parke J. in his opinion thought the defence could not be maintained, on the ground that the plaintiffs had agreed to convey the estate subject to two mortgages, and had never refused. The difficulty in the case had arisen from a dispute between the plaintiffs and a mortgagee, as to the amount due to him. He in consequence refused to convey the estate.]

(14) Moggridge v. Jones, 14 East's R. 486. In an action on a bill for

So it is no answer to an action on a bill or note, that it was for an apprentice fee, and that the apprenticeship had been dissolved for misconduct in the master (15);

Unless it appear that the fee was not to be paid unless the apprenticeship continued till a given period, and the dissolution occurred before that period had arrived. (15)

[It is no defence to a promissory note, given in consideration of a sale of pews, followed with possession in the vendee, that the vendor refuses to execute a conveyance of the pews. The remedy is by compelling a performance. (*n*)

If a note be given in satisfaction of a judgment, it is a good defence to an action on the note, that the judgment has been set aside upon a writ of *audita querela*. (*o*)

Where one of two defendants gave his note in satisfaction of a judgment against them, on which they had sued out an *audita querela*, and also discharged the *audita querela*, but the other defendant pursued the *audita querela* and obtained a re-

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200*l*. by drawer against acceptor, the defence was that the acceptance was given as part of the consideration for a lease plaintiff was to execute to defendant, and which he had refused to execute: by the agreement plaintiff agreed to let, and defendant to take, for twenty-one years, from 29th December next; and plaintiff, in consideration of 500*l*. to be paid by defendant by three bills, agreed to execute the lease: defendant was let into possession and gave the bills, of which that sued on was one. Lord Ellenborough held the refusal to execute the lease no answer to the action; and that the consideration had not wholly failed, because plaintiff had been let into possession: verdict for plaintiff. Motion for new trial: but the Court thought the verdict right, and that defendant must resort to his remedy upon the agreement, if plaintiff persisted in refusing to execute the lease.

(15) Grant v. Welchman, 16 East, 207. Payee against maker, on note for 6*l*. of three years' standing: defence, first, that it was in part for an apprentice fee, and that the apprenticeship was for less than seven years: secondly, that a year before the action the apprentice was discharged, because plaintiff had enticed him to commit felony: Graham B. overruled both objections: and on motion for nonsuit, the Court answered to the first objection, that the apprenticeship was voidable only, not void; and on the second, they inquired how the consideration for the apprentice was reserved, and it appearing that it was all to be paid at the time of the binding, but that the note was taken as an indulgence, they thought that decisive against defendant; and rule refused.

See Jackson v. Warwick, antè, p. 531, and Ledger v. Ewer, antè, p. 531.

[(*n*) Freligh v. Platt, 5 Cowen, 494.]

[(*o*) Dennison v. Brown, 3 Verm. R. 170.]

versal of the judgment, the discharge being held inoperative, it was held that the note was not binding. (*o*)

A note given by the defendant in an action of slander as a compromise of the action, is founded on a sufficient consideration, although the words laid in the declaration are not actionable. (*p*)

The discharge by the mother of an illegitimate child, in Vermont, of a prosecution brought by her under a statute of the State, is a good consideration for a note given by the father in settlement of the prosecution. (*q*)

It is no defence to such note that the father has since been compelled, by a prosecution of the overseers, to give bonds to the town, to indemnify against the support of such child, the mother having always supported such child from its birth. (*r*)

The submission to arbitration by a married woman, and a note made by her to bind the submission, being both void, if made without her husband's consent, a note given by the opposite party to bind the submission on his part, is also void, in the hands of any one who takes it with a knowledge of the facts. (*s*)

It is no defence to an action on a note, that it was given for the price of a part of a lottery ticket owned by the plaintiff, which it was rumored of at the time that it had drawn a prize, though in fact it had drawn a blank. (*t*)

A note given by a person as executor or administrator, is held not to be binding on him, for want of consideration, unless he has assets, or the note is given in consideration of forbearance to sue, or some other good consideration. (*u*)

[(*p*) O'Keson v. Barclay, 2 Penn. 531.]

[(*q*) Haven v. Hobbs, 1 Verm. R. 238; Knight v. Priest, 2 Verm. R. 507.]

[(*r*) Knight v. Priest, 2 Verm. R. 207.]

[(*s*) Rumsey v. Leek, 5 Wend. 20.]

[(*t*) Barnum v. Barnum, 8 Conn. 469. Daggett J. said, "This, for aught which appears, was a fair speculation Neither of the parties, as the facts show, knew the fate of the ticket, it was therefore a bargain of hazard."

[(*u*) The declaration on a note stated that the defendant, as administrator of Peter Bregan, promised to pay the plaintiffs $61.72, "for value received by Peter Bregan and heirs." On demurrer to the declaration—per Curiam. "The declaration does not state a considera-

But where a note was given by an administratrix, expressed to be "value received by my late husband," this was held to be evidence of consideration. (*v*)

It has been held that a note made by a person in his last sickness, and delivered to the payee without consideration, but in expectation of dissolution, and intended as a gift, was a good *donatio causâ mortis;* and that an action lay upon it by the payee against the executors of the maker. (*w*)

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tion for the promise. The note states that the value was received by third persons, and there is no consideration for the promise." Judgment for the defendant. Ten Eyck v. Vanderpoel, 8 Johns. R. 93.

Action on a note by the payee against the makers. The defendants, as executors of De Witt, referred all demands between their testator and the plaintiff to an arbitrator; and the plaintiff and defendants executed notes payable to each other and gave them to the arbitrator. The arbitrator endorsed on the note signed by the defendants, an award that a certain amount was due from the estate of their testator, and endorsed a payment to reduce the note to that amount, and endorsed on the other note that it was fully satisfied. It was agreed verbally at the time of the submission that the defendants were only to be liable on the award as executors. It was held that the action could not be maintained. Per Curiam. "The defendants were executors, and the note they gave was a mode adopted, to submit their difference with the plaintiff as to the matter of account between him and their testator to arbitration. The award endorsed by the arbitrator shows, that it was intended merely that he should ascertain what was due from the estate of the intestate, and that the defendants should be liable only in their representative capacity, or so far only as they had assets. It was incumbent then on the plaintiff to show affirmatively that the defendants had assets; for a promise by an executor to pay is not binding unless he has assets." Schoonmaker v. Roosa, 17 Johns. R. 301.

Bank of Troy v. Topping & al. 9 Wend. 273. Action on a note at sixty days, signed by the defendants thus, "Margaret Topping, administratrix, John Holme, administrator to the estate of John Topping, deceased." The note was given for a debt of the intestate, and had been partly paid out of the estate. It was held that the administrators were not bound to pay any thing on the note beyond the amount of assets which had come into their hands, and that though forbearance to sue would be a good consideration for the note, yet the mere circumstance of its being payable at sixty days did not prove such a forbearance.

But see Childs v. Monins, Thacher v. Dinsmore, and Foster v. Fuller, antè, p. 76.]

[(*v*) Ridout v. Bristow, 1 Crom. & Jer. 231.]

[(*w*) Wright v. Wright, 1 Cowen, 598. See also 1 P. Will. 441.

But in Massachusetts, where a note was given by the maker to a friend to be delivered to the payee after the death of the maker, though the Court allowed the payee to recover against the administrator of the maker, yet it was said that it could not be considered as a *donatio causâ mortis*, for that must be complete at the time by a delivery of the thing

An endorsee of a bill or note. in an action against any prior party thereto, is subject to the same defence as his endorser, if the endorsee took it with a knowledge of such defence; if he received it when overdue.—without consideration,—otherwise than in the usual course of business,—or under circumstances which ought to have excited his suspicions; or if he be a mere agent or trustee of his endorser. (x)

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given. The ground taken by the Court being that the doctrine of *nudum pactum* does not apply to written contracts, where the promise is intended as a voluntary benefit to the party to whom it is made. Parker J. says, "We do not admit that when one voluntarily makes a written promise to another to pay a sum of money, the promise can be avoided merely by proving there was no legal and valuable consideration subsisting at the time. He has indeed precluded himself and his representatives from denying a consideration, when he has under his hand acknowledged one. We are satisfied that none of the decisions respecting the evidence of notes or other written promises for want of consideration are impeached by our decision in this case. A careful examination will discover that in those cases the ground taken in defence is, not that there was originally no consideration, contrary to the express admission of the promisor, but that the consideration had failed, or that it rested in mistake or misapprehension; what the parties supposed to be a consideration turning out in fact to be none." Bowers v. Hurd, 10 Mass. R. 427.

But see Fisk v. Cox, 18 Johns. R. 145. A father, from affection merely, gave his son a promissory note for $1000, payable to him or order in sixty days. In an action brought by the son against the father's executor to recover the amount of the note, it was held that the action could not be maintained: for it was not a *donatio causâ mortis*, nor a valid gift of so much money, but a mere promise to give; and blood or natural affection is not a sufficient consideration to support a simple executory contract.

See on this subject 1 Roper on Leg. 6; Roberts on Frauds, note 115. See also Wells v. Tucker, 3 Binn. R. 366.

A note given by a testator to a person to whom he had devised land by will, in order to serve as a security or guaranty against his altering his will, is without consideration, and void. Winchell v. Latham, 6 Cowen, 682.]

[(x) See Nowell v. Hutchings, 4 Munf, 496; and Evans v. Smith, ante, p. 536; Rumsey v. Leek, 5 Wend. 20; Perry v. Crammond, 1 Wash. C. C. R. 100; Knapp v. Lee, ante; Cone v. Baldwin, 12 Pick. 545; Burroughs v. Nettles, 7 Lou. R. 113; M'Donnough v. Goule, 8 Lou. R. 472; Whitwell v. Crehore, 8 Lou. R. 540; Ayer v. Hutchins, 4 Mass. R. 370; Towne v. Hutchins, 6 Mass. R. 46; Napier v. Elam, 6 Yerger, 108.

In an action by endorsee of a bill against the drawer, it appeared that the bill was endorsed to the plaintiff by the payees in the words following, "Pay Thos. Wilson, Esq. or order, for our use, value received in account. Benson, Abbott, and Briggs." And the defendant was permitted to give in evidence an obligation of the payees to the drawer

So it is held, if the endorsee received the bill or note in payment, or as security for an antecedent debt. (*y*)

Where a bill or note is pledged as security for a loan, or other contract entered into at the time of pledging it, the person to whom it is passed, bonâ fide on his part, is not subject to the same defence as his endorser. (*z*)

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to pay the amount of the bill, when that should appear to have been paid; and in case of its being dishonored to exchange the bill for the obligation, the drawer being liable to no damages but to pay expenses of protest, &c. Verdict directed for defendant, subject to opinion of Court. Parsons C. J. gave the opinion of the Court. "Wilson appearing to have no property" in the bill, "unless as a mere factor, the evidence was properly admitted, the direction of the judge, and the verdict are right, and a new trial cannot be granted." Wilson v. Holmes, 5 Mass. R. 543.

Where a note is assigned for a valuable consideration and in the usual course of business, the assignee cannot be affected by any transactions between the assignor and the parties to such note, to which the assignee is not privy, and evidence to that effect is not relevant in a suit by the assignee against the parties to the note. But such evidence is relevant if it also shows that the assignee was a trustee, or had notice of the transactions, or did not receive the note in the usual course of negotiation. Harrisburg Bank v. Meyer, 6 Serg. & Raw. 537.

Tucker v. Smith, 4 Grenl. 415. A note was given by the maker to the payee, without consideration, for the fraudulent purpose of enabling the maker to reduce his property so as to procure a pension as a revolutionary soldier. It was held, that these facts were a good defence to an action brought on the note, by a person to whom it was endorsed, when overdue.

A note on demand, with interest under the legal rate, made by the firm of A. and B., and payable to B. or order, was by him endorsed to C., after six months from the date, as collateral security for money borrowed by B. It was held in action by C. against A., as surviving partner, that C., under these circumstances, took the note, subject to all the equity existing against it in the hands of B. Thompson v. Hale, 6 Pick. 259.

In an action by the holder of a note against the maker, the burden of proof is on the maker, to show that a partial payment, not endorsed on the note, was made before the transfer, and that the transfer was made after the note fell due. Wilbour v. Turner, 5 Pick. 526.]

[(*y*) Bristol v. Sprague, 8 Wend. 423.

Rosa v. Brotherson, 10 Wendell, 85. Savage C. J. in giving the opinion of the Court, said, "The plaintiff in this case gave no value for the note. He loses nothing if the defendant succeeds in his defence. He gave nothing for the note, advanced nothing, nor incurred any responsibility upon its credit. He has no equity superior to that of the maker, and in such case the law leaves him in possession who already has it." See also Bay v. Coddington, antè, 114; Evans v. Smith, antè, 536.]

[(*z*) Bachellor v. Priest, 12 Pick. 399; Foster v. Pearson, Stephens v. Foster, 1 Crompt. Mee. & R. 849 See also King v. Gayoso, 20 Martin, 370.]

In an action against the acceptor of a bill or maker of a note, which is overdue when endorsed to the plaintiff, the defendant in some of the States can avail himself of any payment or set-off which he could have done if the action had been brought by the plaintiff's endorser. (*a*)

[(*a*) Sargent sued Southgate on a note payable to Watson on demand, dated May 5, 1822, which was passed away by Watson February 1, 1824, and afterwards came to the plaintiff's hands. The defendant filed in set-off two notes made by Watson, one dated January 1, 1823, the other dated June 2, 1823, and an account on which a balance was due to him from Watson. He also proved that he had made two payments on the note, for one of which Watson gave him a negotiable note, and for the other a due bill. The payments and set-off proved, amounting to more than the note in suit, a nonsuit was ordered subject to the opinion of the Court. The Court held that the evidence of the payments was properly received, and that the defendant might avail himself of the set-off in the same manner which he could have done had Watson been plaintiff. Sargent v. Southgate, 5 Pick. 312. See also Savage v. Davis, 7 Wend. 223; Shirley v. Todd, 9 Greenl. 83.

In an earlier case of a similar kind, in Massachusetts, the Court expressed some doubt whether a set-off could be filed under the statute of the defendant's claims against the plaintiff's endorser, but intimated that the facts might be given in evidence under the general issue. Peabody v. Peters, 5 Pick. 1. But in a later case, it was held that the defendant could only avail himself of such claims by filing them as a set-off, though he might prove payment to the plaintiff's endorser under the general issue. Braynard v. Fisher, 6 Pick. 355. See also Grew v. Burditt, 9 Pick. 265.

In an action by the endorsee of a note, who had received it from a person to whom the payee had passed it, after it was overdue, the defendant proved, that there being an unsettled account between him and the payee, the payee agreed to take up the note from a creditor to whom he had endorsed it, and upon a settlement of the account, to deliver the note to the defendant; that the payee did accordingly take up the note, and that the balance due to the defendant from the payee, exceeded the amount of the note. It was held that this agreement amounted to a payment of the note, and was a good defence to the action. Peabody v. Peters, 5 Pick. 1.

In another case, of an action brought by an endorsee against the maker, where a note had been passed to the party for whom the action was brought, a long time after it was due, and under such circumstances that he must have had reason to suspect that the defendant had a defence, the defendant was allowed under the general issue to avail himself of notes given to him by the payee before the endorsement. Stockbridge v. Dawson, 5 Pick. 223.

In Pennsylvania, though the endorsee of a note payable *without defalcation*, is in general not liable to a set-off of the maker's claims against the payee; yet where a person takes an assignment of such a note, with full notice of a right of set-off existing on the part of the maker against the payee, who is insolvent at the time, it is held

But in England a set-off is not allowed in such a case. (*b*)

If the defendant in Massachusetts does not avail himself of his set-off, in the manner pointed out by the statute, he cannot make use of it in his defence. (*c*)

But in such a case the defendant can prove in his defence any payment made to the plaintiff's endorser. (*c*)

The mere circumstance of a note's being sold to an endorsee at a considerable discount, unless much less than the customary rate, is not of itself sufficient to justify a jury in inferring that the endorsee was acquainted with the fact of there being no valid consideration for the note. (*d*)

And it is of itself no defence to the maker of the note, in an action by the endorsee. (*e*)

Nor is it any defence that the plaintiff purchased, upon a verbal agreement with his endorser, that he would only exact of the maker of the note about as much as he gave for it. (*e*)

A note's being sold to an endorsee at his own risk, does not render him liable in an action against the maker to the defence that the note was given without consideration, or obtained from him by fraud. (*f*)

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that he takes it subject to the maker's right of defalcation. Lightly v. Brenner, 14 S. & R. 127.

By the last revised statutes of the State of New York, a set-off is allowed in the case stated in the text. The Supreme Court of New York had before decided otherwise. See Johnson v. Bridge, 6 Cowen, 693; Haxtori v. Bishop, 3 Wend. 13; Bridge v. Johnson, 5 Wend. 342.

In Vermont, by statute in an action by the endorsee of a note against the maker, the defendant may off-set all his demands against the payee proper to be pleaded in off-set, which he had before notice of the endorsement. Martin v. Trowbridge, 1 Verm. R. 477.

[(*b*) Burrough v. Moss, 10 B. & C. 558. Bayley J. in giving the judgment of the Court, said, "The impression on my mind was that the defendant was entitled to the set-off; but on discussion of the matter with my Lord Tenterden and my learned brothers, I agree with them in thinking, that the endorsee of an overdue bill or note is liable to such equities only as attach to the bill or note itself, and not to claims arising out of collateral matters."]

[(*c*) See Sargent v. Southgate, ante, 546.]

[(*d*) Perkins v. Challis, 1 N. H. Rep. 254.]

[(*e*) Babson v. Webber, 9 Pick. 163.]

[(*f*) Russel brought an action against the makers of a note. An endorsement by the payee ordered the contents to be paid to the plaintiff at his own risk, and continued, "I am not to be made liable to pay the same, as the note was taken without my knowledge, Z. Booth." It ap-

But where a note of a solvent maker is sold at a very great discount, with an agreement on the part of the purchaser to pay a further sum if the note is collected without suit, the purchaser is subject to the same defence as the party from whom he purchased. (*g*)

A note's being postdated, is not such a circumstance of suspicion as will render a person who receives it before the day of its date, subject to the same defence as the person from whom he received it. (*h*)

The words "*ne varietur*," written on a note by a notary, is not such a suspicious circumstance as will render an endorsee subject to the same defence as the payee in Louisiana. (*i*)

It is not necessary for the defendant, in order to setting up his defence, to prove that the plaintiff purchased the bill or note with a full knowledge of the want or failure of consideration. If the circumstances attending the transfer are such as to put him upon his guard, and he makes no inquiry into the consideration, he purchases at his peril. (*k*)

If the endorser of a note be the person with whom the maker contracted, the endorser having endorsed it only for the maker's accommodation, the maker, in an action by the endorsee, may make the same defence as if the endorsee were payee. (*l*)

So if the holder of a note receives it from the maker under circumstances which ought to excite his suspicions, he can-

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peared that Booth objected to endorsing the note to Russel, as it had been taken by his partner, and he did not know for what it was taken. It was held that the defendants could not be permitted to show a want of consideration for the note or fraud in obtaining it, without showing that the endorsee was not a bonâ fide holder for a valuable consideration. Livingston J. giving the opinion of the Court, said, "There is nothing disclosed in this case which would have rendered it proper to receive evidence, either of a want of a consideration, or of a fraud in obtaining it, to which the plaintiff was not himself a party." Russel v. Ball, 2 Johns. R. 50. See also Cone v. Baldwin, 12 Pick. 545.]

[(*g*) Hunt v. Sanford, 6 Yerger, 387.]

[(*h*) Brewster v. M'Cadel, 8 Wend. 478.]

[(*i*) Fusilier v. Bonin, 12 Martin, 235.]

[(*k*) Cone v. Baldwin, 12 Pick. 545.]

[(*l*) Grew v. Burditt, 9 Pick. 265; Lanclos v. Robertson, 3 Miller, 259.]

not recover against an accommodation endorser, where the maker had in fact made an unauthorized use of the note. (*m*)

As if the word *renewal* be written on the face of a note, endorsed for the accommodation of the maker, to enable him to take up another note at the bank with it, a person to whom the maker passes the note cannot recover of the endorser, for the word *renewal* would be sufficient to put him on inquiry. (*m*)

But if the word *renewal* be scratched out in such a manner that it would not attract a careful person's suspicion on reading the note in the common course of business, the endorser could not set up the fraud of the maker in his defence, although some traces of the word might be discoverable on a close examination. (*m*)

In an action against the acceptor of a bill or maker of a note endorsed after it is due by the payee to the plaintiff, the declarations of the payee made while he held the bill or note, are receivable in evidence for the defendant. (*n*)

But declarations of the payee tending to defeat the plaintiff's claim, made subsequently to the transfer, are inadmissible. (*o*)

And it has been held in an action against the maker by the holder of a note, payable to A. B. or bearer, and transferred to the plaintiff, that A. B.'s declarations in discharge of the maker are inadmissible, as he is a competent witness. (*p*)

The assignee of a note not negotiable, takes it subject to all the equity between the original parties, existing at the time of the assignment, and notice to the maker. (*q*)

But if the maker of such a note promise the assignee, who has taken it for a valuable consideration, to pay him, without

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[(*m*) Hall v. Hale, 8 Conn. R. 236.]

[(*n*) Shirley v. Todd, 9 Greenl. 83: Hatch v. Dennis, 1 Fairf. 254. See antè, p. 502, 503.]

[(*o*) Matthews v. Houghton, 1 Fairf. 420. This was an action brought by the assignee of a note not negotiable, against the maker. It was held the declarations and admissions of the assignor made subsequently to the assignment, were not admissible in evidence. See Hacket v. Martin, 8 Greenl. 77.]

[(*p*) Whitaker v. Brown, 8 Wend. 490.]

[(*q*) Chamberlain v. Gorham, 20 Johns. R. 144.]

objecting that he has a set-off or other defence, or if the maker made the note for the purpose of having it passed to the assignee, he cannot avail himself of such defence. (*r*)

In an action on a note not negotiable, brought in the payee's name, for the benefit of a *bonâ fide* purchaser for a valuable consideration, the maker cannot set up a defeasance which was given him by the payee at the time the note was made, and as part of the same transaction, if the note was made unconditional in its form, by a fraudulent agreement between the maker and payee, in order to enable the maker to deceive and delay his creditors by showing the note to them, or to enable him to sell it to some person with the intention of having the defeasance set up as a defence. (*s*)

Where the holder of a note, for which he has paid a valuable consideration to an endorser, is subject to the same defence as his endorser from the maker, if the maker takes up the note and gives the holder a new one, with another surety, the maker cannot set up the original defence which he might have made to the first note in an action on the new one. (*t*)]

The want of consideration, in toto or in part, cannot be insisted upon, if the plaintiff, or any intermediate party between him and the defendant, took the bill or note bonâ fide, and upon a valid consideration. (16)

Where it has been so taken, it is no defence that the bill or note was originally accommodation paper, and known so to be. (17)

[(*r*) Wiggin v. Damrell, 4 N. H. Rep. 89.]
[(*s*) Lyon v. Summers, 6 Conn. R. 399.]
[(*t*) Coco v. Lacour, 4 Miller, 507.]

(16) Morris v. Lee, B. R. Hil. 26 Geo. 3. In an action by the endorsee against the maker of a note thirteen years old, the defendant obtained a rule nisi to set aside a judgment by default, on an affidavit by a third person that he believed the defendant was swindled out of the note. An affidavit was made on the other side that the plaintiff took the note bonâ fide, and gave a valuable consideration for it; and the Court held, that however improperly it might have been obtained, a third person, who took it fairly and gave a consideration for it, was entitled to recover, and they discharged the rule. And see Com. 43. 1 Term Rep. 40. 2 Term Rep. 71. 2 Atk. 182. Bull. Nisi Prius, 274. See also De Bras v. Forbes, 1 Esp. N. P. C. 117, [and Hubbard v. Fulton's heirs, 7 Martin, 241; S. C. 9 Martin, 86; Warren v. Lynch, 5 Johns. R. 239; Perkins v. Challis, 1 N. H. Rep. 254.]

(17) Smith v. Knox, 3 Esp. N. P. C. 46. In an action by the en-

And to support the defence against a person who may be a bonâ fide holder for value, the plaintiff should be apprised before the trial that he will be required to show from whom he took the bill or note, and on what consideration; otherwise, that defence may be excluded. (18)

If a banker be under acceptance for a customer to an amount beyond the cash balance in his hands, every bill he holds of that customer's bonâ fide he is to be considered as holding for value. (19)

And it makes no difference, though he hold other collateral securities more than sufficient to cover the excess of his acceptances. (19)

And it is no ground for impeaching his right to a bill paya-

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dorsee of the drawer of a bill against the acceptor, it was urged in defence that this was an accommodation acceptance. But Lord Eldon said, "if a person give a bill for a particular purpose, and that is known to the party taking the bill, as, for example, to answer a particular demand, then the party taking the bill cannot apply it to a different purpose; but where a bill is given under no such restriction, but given merely for the accommodation of the drawer or payee, and that is sent into the world, it is no answer to an action brought on that bill, that the defendant accepted it for the accommodation of the drawer, and that that fact was known to the holder."

Charles v. Marsden, 1 Taunt. 224. Endorsees of the drawer of a bill against the acceptor. The defendant pleaded that he had accepted the bill for the accommodation of the drawer, without any consideration, and that after the bill became due it was endorsed to the plaintiffs, they knowing that it was an accommodation one. On special demurrer to the replication, the argument turned on the validity of the plea; and the whole Court held, that there being no fraud or collusion alleged, the plea was bad, and gave judgment for the plaintiffs. Sed quære.

[S. P. Grant v. Elliott, 7 Wend. 227.]

(18) See Patterson v. Hardacre, antè, p. 494.

(19) Bosanquet v. Dudman, 1 Stark. 1. Plaintiffs sued as endorsees of a bill, and it was made a question whether they were holders for value: they had it from Clarkson and Co., for whom they were bankers, and they took this and many other securities to cover their advances and acceptances: they were under acceptances for Clarkson and Co. beyond the amount of the cash balance in their hands; and a question being put as to the amount of the acceptances and cash balance, and the value of the other securities, Lord Ellenborough said he should hold that, if the acceptances exceeded the cash balance, plaintiffs held all the collateral securities for value. The inquiry was dropped, and plaintiffs had a verdict. See ex parte Bloxham, antè, p. 466.

ble to such customer or creditor on demand, that such bill was one or two years old when he took it. (20)

Affection is not a sufficient consideration for a bill or note (21);

Nor is gratitude. (21)

Nor an intention to avoid the legacy duty. (21)

If the consideration upon which a bill or note is given or transferred be one, which the plaintiff, upon principles of public policy, would be precluded from recovering unless he could

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(20) Heywood and others v. Watson, 4 Bingh. 496. In 1824 Morrall and Watson banked with plaintiffs. They got leave from plaintiffs to overdraw, and on that account Morrall gave plaintiffs his promissory note, payable to plaintiffs on demand, for 2000*l*., dated 9th February, 1824. On 10th February, Watson gave Morrall a note for 1000*l*., payable to Morrall or order on demand. It was given to secure to Morrall a moiety of what he should be compelled to pay, either on his note for 2000*l*. or on the joint account of himself and Watson. Morrall and Watson continued in partnership till February 1825, and the balance from them to plaintiffs at that time was 1300*l*. Morrall endorsed to plaintiffs Watson's note for 1000*l*., but the time at which it was endorsed did not appear. Plaintiffs had it in June 1826, but whether they had it before that time did not appear. There was *nothing* to show that plaintiffs knew under what circumstances Morrall had the note from Watson, or that they were apprised of the occasion upon which it was given. Plaintiffs sued Watson upon the note, and a special case having been reserved, it was insisted that the endorsement by Morrall to plaintiffs was evidently a trick by Morrall to compel Watson to pay 1000*l*., the whole amount of the note, instead of 600*l*., his moiety of the debt due from Morrall and Watson to plaintiffs; but the Court held, that as there was nothing to show that plaintiffs knew upon what occasion or for what cause Watson gave the note to Morrall, plaintiffs were entitled to the full amount of the note from Watson; and if Watson were thereby forced to pay more than as between Morrall and him he ought to pay, that was to be settled between him and Morrall.

(21) Holliday v. Atkinson, 5 Barn. & Cr. 501. In an action on a note, importing to be for value received, by payee against the executor of the maker, it appeared that plaintiff was only nine years old when the note was given, and there was no evidence of consideration: the jury were told that proof of consideration was not necessary, that many good considerations might have existed, and that affection towards the child, gratitude towards the father, or an intention to avoid the legacy duty, would have sufficed. On rule nisi for new trial, and cause shown, the Court thought that considering the child's age at the time, and that it appeared that the testator was in a state of imbecility, it was a question for the jury, whether the note was given on a legal consideration; that neither gratitude to the father, or affection to plaintiff, nor as they thought, an intention to avoid the legacy duty, would have constituted a legal consideration.

prove that he stood in a particular condition, he must be prepared, at his peril, to prove that he stood in that condition. (22);

At least, if he have had notice that the consideration will be disputed (22);

As, in the case of a man who sues upon a bill or note given him for his bill (22) as an apothecary.

[Where A. gives his note to B. for a consideration passing from B. to C., a want or failure of consideration between B. and C. is no defence to an action on the note by B. against A. (*u*)

And where A. gives his note to B. for a consideration passing from C. to A., a want or failure of consideration between C. and A. is no defence to an action on the note. (*v*)

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(22) Blogg v. Pinkers, 1 Ryan & Moody, 125. Plaintiff sued upon a note for 180*l.* in consideration of his care and medical attendance bestowed on the maker: defendant gave notice of his intention to dispute the consideration on which the note was given: his defence was, that it was given for plaintiff's services and medicines as an apothecary, and he insisted thereupon that plaintiff was bound to show he had obtained his certificate under 55 Geo. 3. c. 194. s. 21. Best C. J. said he should leave it to the jury whether the services, &c. for which the note was given were not those of an apothecary, and intimated his opinion that if they were, plaintiff could not recover without bringing himself within the provisions of that statute. Upon that intimation plaintiff's counsel elected to be nonsuited.

[(*u*) Nickerson assigned an apprentice, who was bound to him, to E. Howard, and in part payment of the consideration W. B. Howard gave his note to Nickerson. In an action on this note against the maker, it was held that the defendant could not set up as a defence that the assignment was invalid. Platt J. giving the opinion of the Court, said, "Whether the assignment was valid or not, it must be presumed that the note was made at the request of E. Howard; and as between him and the defendant it can never be material whether the assignment of the indenture passed any interest or not." Nickerson v. Howard, 19 Johns. R. 113.]

[(*v*) Ebenezer Clark, one of the heirs, and also the administrator of Seth Clark, gave a bond to Mrs. Sanger, another heir, conditioned that he should pay all the debts of the deceased, and should procure a decree of the judge of probate assigning her all the real estate of the deceased. Afterwards she and her husband released all her right in the said real estate to Ebenezer, and he by her request conveyed it to Cleveland by deed with warranty. Cleveland gave two notes to Mrs. Sanger for the price, one of which he afterwards paid. And a memorandum was made on the bond by her agent, acknowledging the deed to Cleveland to be equivalent to procuring a decree of the judge of probate. In an action by Sanger and wife against Cleveland on the

It is no defence to an action on a note brought against the makers of it, that the note was given by the defendants, who composed a partnership, to one of the members of the firm, for a balance due to him, and that when the note was endorsed by him to the plaintiff, the plaintiff knew the consideration for which it was given. (*w*)

It is no defence to an action against the acceptor of a bill, that the bill was drawn in the name of one member of a firm, for a debt due from the acceptor to the firm, the bill having the same effect in regard to the original debt as if drawn in the name of the firm. (*x*)

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other note, it appeared that the land was afterwards sold by leave of court to pay the debts of Seth Clark, and purchased by Cleveland; and he claimed to have the amount paid by him deducted from the note. But it was held to be no defence, and judgment was given for the whole amount of the note. Sanger v. Cleveland, 10 Mass. R. 415.

Carmer gave his bond to Bartlett, for a certain sum, on payment of which Bartlett was to convey a certain parcel of land to him. Bartlett being indebted to Freligh, gave him the bond and authorized him to receive payment. Freligh received of Carmer as principal, and Gaylord as surety, their joint and several note for the amount due Bartlett, and gave up the bond to Carmer. There was some evidence that Freligh, when he received the note, promised to give it up if Bartlett should refuse to consider the note as payment. Bartlett afterwards did refuse to consider the note as payment, and becoming bankrupt could give no title to the land. In an action on this note it was held that these facts were no defence. Spencer J. giving the opinion of the Court, said, "The giving the note by Carmer, and his taking possession of the bond under the authority given by Bartlett to Freligh, amounted in law to a payment. The agreement that Bartlett should allow the note as a payment, was in effect performed, since he could not legally disallow it; and his subsequent dissent, after he was thus concluded by the acts of his agent, was vain and idle. The subsequent bankruptcy of Bartlett cannot vary the case. If Carmer chose to part with his money before he acquired a title for the land, it was a want of caution on his part, for which he must blame himself." Parsons v. Gaylord, 3 Johns. R. 463.]

[(*w*) Smith v. Lusher, 5 Cowen, 688. This was an action by the endorsee against the makers of a note, signed by them in their partnership name of William Soulden & Co. Smith, one of the defendants, pleaded that Van Santvoord, the payee of the note, was one of the defendants, that the note was made by Soulden without the knowledge or consent of Smith for an account then alleged by Van Santvoord to be due to him from the firm; and knew that Van Santvoord was a partner, and the consideration for which the note was given. On demurrer it was held that the plea was bad, as it contained no averment that the alleged debt to Van Santvoord was not due, or that the note was given in fraud of the firm.]

[(*x*) Toulin v. Lawrence, 3 M. & P. 555; S. C. 6 Bing. 376.]

And if after the dissolution of a partnership, where by the deed of dissolution it is stipulated that one of the partners shall receive all the debts, a debtor of the firm accepts a bill drawn by the other partner for the debt, the stipulation in the deed of dissolution will be no defence to an action against the acceptor of the bill. (*y*)

It is held in Louisiana that the acceptor of a bill cannot set up as a defence to an action by the payee, that the drawer gave the bill in error and without consideration. (*z*)

In a suit at law on a note given by one partner to another the defendant cannot go into an investigation of the partnership accounts to show that there was a mistake in making the note, and there was no consideration for giving it. The only remedy is in equity. (*a*)

It was held in Maryland that a note given by a member of the vestry of a church in his own name, for a debt of the vestry, a corporate body, payable at a future day, was a promise to pay the debt of another without consideration, and void. (*b*)

In an action by the receivers of an insolvent bank upon a note assigned to them by the bank, before the note was due it has been held that the defendant cannot set off notes of the bank, of which he became the holder before his note fell due although on the day his note fell due he made a tender of them in payment of his note. (*c*)

If the endorser of a note agree with the maker to pay i

[(*y*) King v. Smith, 4 C. & P. 108. Tenterden C. J. said, "Either partner might receive the debt after the dissolution of the partnership notwithstanding the stipulation in this deed that the father should receive all the debts; and I am of opinion that as the plaintiff might receive the money, he might take a bill for it. As between the two partners this deed is binding, and the plaintiff will have to account for this money to his father," (the other partner.)]

[(*z*) Debuys v. Johnson, 16 Martin, 286.]

[(*a*) Rogers & al. v. Rogers, 1 Hall, 391; Rogers & al. v. Rogers & al. 1 Hall, 394.]

[(*b*) Rogers v. Waters, 2 Gill & Johns. 64. But was not the debt given a sufficient consideration for the note? Giving the note did not discharge the vestry, it is true, but this body could not have been sued until the day of payment of the note had arrived, and the note dishonored.]

[(*c*) Haxtun v. Bishop, 3 Wend. 13. See Tillon v. Britton, antè.]

when it becomes due, this undertaking is a good consideration for a note from the maker to the endorser. (*d*)

A submission to arbitration, is a good consideration for a note deposited with the arbitrators, on which they make an endorsement so as to leave the amount due on the note as their award. (*e*)

A note accepted in satisfaction of a breach of covenants, is a bar to any future action on the covenants, although no release of such covenants be executed at the time of giving the note; and consequently the note is good, being given for a sufficient consideration. (*f*)

[(*d*) Cushing being an endorser on notes of Gore and Crafton for their accommodation, Grafton, before the notes became due, gave the company's note to Cushing, to enable him to indemnify himself by an attachment of property or otherwise; it being understood that Cushing was to take up and discharge the notes endorsed by him as they became due; and to hold the note then given as good only for the amount of the others which he should take up. There was no evidence, however, of any express promise by Cushing. Cushing brought an action immediately upon the note given him, and attached property, which was also subsequently attached by creditors whose demands were due before either of the notes endorsed by Cushing became due. It was held that Cushing might recover the amount of the notes endorsed by him with interest. Parker C. J. said, "When an endorser has either expressly or implied undertaken to pay the note by him endorsed, there can be no question that such an undertaking is a good and valuable consideration for a promissory note." Cushing v. Gore, 15 Mass. R. 69.]

[(*e*) Watrous being under arrest in an action of slander at the suit of Shepard, made a note to Shepard for $200, and delivered it to certain arbitrators who were to decide upon the subject in dispute between him and Shepard; and in consequence of this arrangement was discharged from custody. The arbitrators endorsed $100, and returned the note to Shepard. It was held that the note was given for a good consideration; and that in an action on it no evidence could be received to show that the plaintiff had no cause of action in the original suit. Shepard v. Watrous, 3 Cain. R. 166.

Where referees, having agreed on an award, wrote a note, which one of the parties to the submission signed with a surety, not knowing the amount for which the note was given, the body of the note being concealed from sight, and the parties also signed mutual receipts; it was held that there was a sufficient consideration for the note in any view of the case, either in the adjustment of the controversy by the receipts, or in the award itself. Page v. Pendergast, 2 N. Ham. R. 233. Quære whether any such defence would be permitted in an action on the note between the original parties, as would be admissible in an action on the award. Ib.]

[(*f*) Moody v. Leavitt, 2 N. Hamp. R. 171.]

A note given for assessments on stock in a corporation, is valid, although a statute give a remedy for non-payment of assessments by sale of the shares. (*g*)

Where A. agreed to serve B. for a year at a certain rate per day, and at the end of three months B. gave A. a note for his services for that time, and A. left B.'s service without his consent before the year was ended; it was held that A. might maintain an action against B. on the note, notwithstanding the original contract was entire, the note being pro tanto a change or modification of the original contract. (*h*)

Members of a religious society subscribed money to be added to a fund previously established for the support of the minister of the society, a part of their written agreement being that in case the whole sum subscribed should amount to a sufficient addition to the fund, for the support of a minister, the subscribers should be held, but otherwise not. A sufficient sum was subscribed. It was held that a note given to the trustees of the fund, a corporation, by one of the subscribers for the amount of his subscription, was founded on a sufficient consideration. (*i*)]

Illegality in the consideration, either wholly or in part, is another ground of defence.

The (23) debt of a third person, or a debt barred either by (24) the statute of limitations, by a discharge under an insol-

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[(*g*) In an action by a turnpike company declaring upon a note made by the defendant for $125, for five shares of the capital stock of the corporation, to be paid in such manner and proportion, and at such time and place, as the company should require, it was held that there was a sufficient consideration on the face of the note, and that the action was maintainable notwithstanding the statute remedy in case of non-payment, of a forfeiture of the shares and all previous payments. Goshen Turnpike Co. v. Hurtin, 9 Johns. R. 217. S. P. Dutchess Cotton Manufactory v. Davis, 14 Johns. R. 238.]

[(*h*) Thorpe v. White, 13 Johns. R. 53.]

[(*i*) Trustees, &c. v. Stetson, 5 Pick. 506.]

(23) Popplewell v. Wilson, Str. 264. A. gave a note to pay so much to B. for a debt due from C. to B.; and on error, it was objected that the debt of a third person was no consideration; but the Court thought otherwise, and the judgment was affirmed.

(24) Vide Lord Raym. 389. 6 Mod. 309. Burr. 2630. Blackst. 703. Cowp. 290.

vent or fugitive act, by a (25) bankruptcy and certificate, or by a composition, is a good consideration; and so is an apprentice fee, though the apprenticeship be for less than seven years. (26)

[Where the act incorporating an insurance company required their capital stock to be invested in a certain manner, it was held that an action might be maintained against a stockholder on a note given to the company for a part of the stock held by him, although this was a different investment from that directed in the act of incorporation. (*k*)]

But, the consideration of (27) signing a bankrupt's certificate, of withdrawing a petition (28) against it, or of (29) joining in the acceptance of a composition, is illegal.

It is a good defence to an action on a bill or note, that it was given as a composition with creditors, and that before plaintiff would accede to the composition, he insisted upon receiving, and did receive, without the knowledge of the other creditors, to the amount of the composition. (30)

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(25) Trueman v. Fenton, Cowp. 544. Birch v. Sharland, 1 Term Rep. 715. Cowp. 290.

(26) See Grant v. Welchman, antè, p. 541.

[(*k*) Little v. Obrien, 9 Mass. R. 423. The Court said, "Whether for this misbehavior of the corporation the government might not seize their franchises, upon due process, is a question not now before us. It does not lay in the mouth of a stockholder for this cause to avoid his contract, which, as between him and the company, was made on a sufficient consideration."

(27) Summer v. Brady, 1 H. Bl. 647.

(28) By 6 Geo. 4. c. 16. s. 125., any contract or security made or given by any bankrupt, or other person, unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration, or with intent to persuade such creditor to consent or to sign such certificate, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable. And see Smith v. Bromley, Dougl. 670.

(29) Spurrett v. Spiller, 1 Atk. 105. Cockshott v. Bennett, 2 Term Rep. 763. Jackson v. Lomas, 4 Term Rep. 166. Cooling v. Noyes, 6 Term Rep. 263.

(30) Knight v. Hunt, 5 Bingh. 432. Wm. Watson owed plaintiff 300*l.* and proposed to compound with his creditors for 10*s.* in the pound: plaintiff refused to accede to the propositions, upon which, Watson's brother agreed to supply plaintiff with coals to the amount of 150*l.* at his own cost, if plaintiff would sign the composition; plaintiff consented, and signed an agreement "to take 10*s.* in the pound, to be paid with the other creditors." Plaintiff was the last creditor who signed;

And it will make no difference that plaintiff had the goods or money from a third person (30);

Or that plaintiff was the last person who acceded to the composition. (30)

So it is an answer to an action on a bill or note, that plaintiff had a demand upon other bills or notes from the defendant, and took a composition upon them from the defendant; if plaintiff held and had a demand upon all the bills or notes at the time he agreed to take the composition, or that fact were unknown to the other creditors; for, if he take a composition, he must take it upon the whole of his demand; or apprize the other creditors if he do not: he is not to take a composition upon part, and continue a creditor for the whole of the residue of the debt. (31)

If the creditor of a bankrupt be also an acting commissioner under his commission, and take a bill or note for his debt whilst the commission is in progress, he cannot enforce payment of such bill or note. (32)

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but the arrangement about the coals was not known to the other creditors. The coals were supplied, and a note for the composition given, and an action being brought upon the note, Littledale J. thought the bargain as to the coals a fraud upon the other creditors, and that, as plaintiff got by the coals as much as the other creditors got by the composition, he was not entitled to recover upon the note, and under his direction the jury found for the defendant. On motion for a new trial, the Court of Common Pleas thought his direction right, and as plaintiff had his 10*s.* in the pound in coals, they thought he ought not to have it again in money. It was not a gratuitous gift after the composition was paid, but a stipulation before the composition was agreed upon. Rule refused.

(31) Britten v. Hughes, 5 Bingh. 460. Plaintiffs held two bills drawn by defendant, the one for 400*l.* due 4th May 1826, and the other for 156*l.* On 10th May he signed a composition deed between defendant and his creditors, which contained a release for the bill of 156*l.*, but he did not notice the bill for 400*l.*, nor were the creditors apprised of it; he afterwards sued defendant upon the bill for 400*l.*, and defendant relied on the composition deed as a defence. Best C. J. thought it was a fraud upon the other creditors to sign only upon one bill, when he had a demand upon two, without apprizing the other creditors that that was the case, and he nonsuited the plaintiff. On a rule to show cause why the nonsuit should not be set aside, the Court (Gaselee J. differing) held the nonsuit right, and dismissed the rule.

(32) Haywood v. Chambers, 5 Barn. & Ald. 753. 1 Dow. & Ry. 411. In an action by payee of a note against the maker, it appeared

Especially, if he afterwards signed the bankrupt's certificate as such commissioner. (32)

Though he did not prove his debt under the commission. (32)

Where however a creditor *has* joined in a deed of composition, it is (33) not illegal to obtain the security of a third person for such composition.

And therefore a bill given by a third person, as such security, is good (33);

Though such creditor's composition be thereby secured to be paid at an (33) earlier period than that of the other creditors.

But, to stipulate privately for such additional security before joining in the acceptance of the composition, is a (34) fraud on the other creditors.

And if there be a private stipulation for more than the composition-money from a third person, and the third person pay the money, he cannot recover upon any bill or note the debtor may give him for reimbursement (35);

Though the creditor were induced originally to trust the debtor upon a representation by such third person of his (the third person's) responsibility (35);

And refused, on the ground of that representation, to consent to the composition without such stipulation. (35)

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that defendant had been a bankrupt and obtained his certificate; that the note was given to plaintiff, between the second and third meetings, for a debt due before the bankruptcy; that plaintiff was one of the acting commissioners under the defendant's commission; that he did not prove his debt under the commission, but that after he had received the note he signed the defendant's certificate as one of the commissioners. Abbott C. J. thought the defendant not a free agent when he gave the note, and nonsuited the plaintiff; and on motion to enter a verdict for plaintiff, the Court said, "a security to induce a commissioner to sign a bankrupt's certificate would be clearly void, and it was against public policy to allow any thing which led to that result: a commissioner has an important public duty to perform, and this would have a tendency to warp his conduct in the discharge of it; and in giving a security under such circumstances, the bankrupt could not be deemed a free agent. Rule refused.

(33) Feise v. Randall, 6 Term Rep. 146.

(34) Leicester v. Rose, 4 East's Rep. 372.

(35) Bryant v. Christie, 1 Stark. 329. Bach trusted Christie to the amount of 332*l.*, on a representation by Bryant of Christie's responsibility. Christie became embarrassed, and offered to compound with

A note given by an insolvent debtor to a creditor, in consideration of his withdrawing his opposition to the debtor's discharge under an insolvent law, is founded on an illegal consideration and void in the hands of the creditor, or any holder who is chargeable with notice of the transaction. (*l*)

So a note given to the creditor of an insolvent, to induce him to become a petitioning creditor under an insolvent act, is void, on account of illegality of the consideration. (*m*)

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his creditors at 10*s.* in the pound. Bach considered himself guaranteed by Bryant, and therefore refused to sign the composition deed unless Bryant would promise him the remainder of his debt. Bryant promised accordingly, and Bach signed the deed which released Christie: the composition was paid, and Bryant paid the difference. Christie accepted bills to reimburse Bryant, and Bryant sued thereon. But Lord Ellenborough considered this as a circuitous mode of securing Bach the full amount of his debt, and a fraud upon the creditors at large, and he nonsuited the plaintiff.

[(*l*) Sharp v. Tees, 4 Halst. R. 352.

Rice and Bush had made several notes to Forsaith, which he had endorsed to the Wiggins, residents at Boston. Bush being about to obtain a discharge under the insolvent laws, Forsaith, being at New York, opposed it. In consideration of Forsaith's withdrawing his opposition Bush, April 22, 1812, made a note payable to Forsaith or order for $1000, dating it May 24th, 1812, and a memorandum of the day when it was executed was endorsed. On the 1st of May Bush obtained his discharge. Forsaith, on his return, endorsed the note to the Wiggins, without informing them how he obtained it. It was held that an action by the Wiggins against Bush on this note could not be maintained. Yates J. giving the opinion of the Court, said, "The note was void in law, as a fraud upon other creditors.—But it is contended that this is a defence set up against third persons, who are subsequent holders, for a valuable consideration, and without notice. This could not give validity to the note if void *ab initio*. By the endorsement on the note of the real date, the plaintiffs had such information as ought to have led to an inquiry into the manner the payee obtained it. The neglect of the plaintiffs to make any inquiry, ought to subject them to the consequences of the transaction between the defendant and Forsaith, the immediate parties. It is, however, manifest, from the face of the transaction, that Forsaith acted as the agent of the plaintiffs; they of course are bound by his acts, and are subject to the same consequences, as if the whole had been conducted by themselves." Wiggin v. Bush, 12 Johns. R. 306.]

[(*m*) Eden being about to take the benefit of the "act for giving relief in cases of insolvency," applied to Hurtin, one of his creditors, to sign the petition, and gave Hurtin a note for the amount of his debt, leaving the date blank, and Hurtin, without annexing any affidavit of his debt, put his name, which was the very last, to the petition; though exclusive of him there was a sufficiency in number and value to exonerate the defendant. After Eden obtained his discharge, Hurtin filled up the blank as if the note had been then given, and endorsed it to a

And where such a note was given to the creditor by a third person, it was held that the note being void *ab initio*, the maker was not liable upon it, although he had been indemnified by the original debtor. (*n*)]

Past (36) seduction is a good consideration; future (37) prostitution, an illegal one.

A note given to parish officers for a sum certain, to defray the future expenses of a bastard child, is (38) illegal; the officers being authorized by law to take an indemnity only.

[A note given to a person to induce him not to bid at a sale of land on execution, is void on account of the illegality of the consideration. (*o*)]

Dropping (39) a criminal prosecution, or suppressing evidence thereon, [or concealing felony, (*p*)] is an illegal consideration: but, where a person has been convicted of a misde-

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third person in trust for one of his relations. Eden afterwards promised to pay the note. It was held that the endorsee could not maintain an action against Eden on the note. Thompson J. giving the opinion of the Court, said, "The transaction was founded in fraud, and against the policy of the insolvent act. The note was void in its creation, and being so, the subsequent promise will avail nothing. As the note was held by the plaintiff as trustee, and for the benefit of some relation of Hurtin, we consider the cause in the same point of view as if the original parties were now before us." Payne v. Eden, 3 Cain. R. 213.]

[(*n*) Yeomans v. Chatterton, 9 Johns. R. 259.]

(36) Annandall v. Harris, 2 P. Wms. 432. Cray v. Rooke, Forrest, 153. Turner v. Vaughan, 2 Wils. 339. [See Singleton v. Bremar, Harper's R. 201, in which it was held that past cohabitation was not a good consideration to support a promise.]

(37) Walker v. Parkins, Burr. 1568.

(38) Cole v. Gower, 6 East's Rep. 110.

[(*o*) Caswell and Noble, after a judgment against Eggleston, (which was a lien on his land), but without any knowledge of it, purchased land of him for a good consideration. The land being for sale on an execution on the judgment, Caswell and Noble agreed with the judgment creditor, that if he would not bid against them, they would pay his execution and $150. Notes were accordingly given by them for this sum. It was held that no action could be maintained upon the notes against the makers, by a person receiving them after they were due, and who was also acquainted with the nature of the consideration. Kent J. said, "It was a consideration against public policy, which encourages bidding at sales on execution." Jones v. Caswell, 3 Johns. Cas. 29.]

(39) 3 P. Wms. 279. Collins v. Blantern, 2 Wils. 349. [Vincent v. Grome, 1 Yerger, 430.]

[(*p*) Roll v. Raguet, 4 Hamm. R. 400.]

meanor, and the Court offer that if he will pay a certain sum for the expenses of the prosecution, the sentence shall be for a shorter period of imprisonment than it otherwise would be, a note given by him for such sum is (40), as far as respects the consideration, unobjectionable.

And where there are both civil and criminal proceedings, an agreement to compound the civil proceedings and to take a given sum for costs, and that defendant shall give a bill for the amount, will not make the bill illegal, if the criminal costs do not appear to have been included, and it be no part of the bargain that the criminal proceedings shall be abandoned. (41)

So, the release by an excise officer of a person apprehended for penalties under the excise laws, is a (42) sufficient consideration for a note given, with the approbation of the commissioners, for the amount of such penalties.

Or if an officer who has a warrant to levy excise penalties take a note for the amount, though such a transaction ought to be looked upon with extreme jealousy, yet, if there have been no extortion, in the officer, nor other improper conduct, the consideration will be unobjectionable, and the note valid. (43)

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(40) Beely v. Wingfield, 11 East's Rep. 46. [See also Kirk v. Strickwood, 4 B. & Ald. 421.]

(41) Harding v. Cooper, 1 Stark. 467. In an action against the acceptor of a bill, it appeared that plaintiffs had sued the drawer and taken out a commission of bankruptcy against him, and, on his having obtained his discharge as an insolvent, had indicted him for fraud in obtaining it. They then came to an agreement that plaintiffs should have 2*s.* 6*d.* in the pound for their debt, 220*l.* for costs, without taxation, and that the commission should be superseded, and defendant gave his acceptance for the amount. Plaintiffs afterwards consented that the indictment should be quashed. It was urged that this was an illegal consideration; and Lord Ellenborough said, "a stipulation to drop the prosecution would, without doubt, have been illegal; but, if the civil rights only were compounded, and plaintiffs chose afterwards to forego the prosecution, the transaction was not illegal:" and there being no evidence that the costs of the prosecution were mentioned during the negotiation, or included in the 220*l.*, or that there was any stipulation for dropping the prosecution, the plaintiffs had a verdict.

(42) Pilkington v. Green, 2 Bos. & Pull. 151.

(43) Sugars v. Brinkworth, 4 Camb. 46. Defendant was convicted in excise penalties to the amount of 340*l.*, and plaintiff, a supervisor, had a warrant to levy the amount. Plaintiff took defendant's note at two months for that sum, and though he had no previous authority from the commissioners to take it, they approved of it when they knew

Especially, if the commissioners afterwards approve of what has been done. (43)

A (44) recommendation to an office in the king's household, though of a private nature, and not within the statute of the 5th and 6th Edw. 3.; a (45) smuggling, an (46) usurious, or a (47) stock-jobbing contract; a wager upon the future amount of any branch of the (48) public revenue, or selling spirituous liquors in small quantities, contrary to 24 Geo. 2. c. 40. s. 12., is an illegal consideration. (49)

So, money lost by gaming, (except (50) in some part of a royal palace in which the king is then actually resident, the freehold and inheritance of which part is in the crown, and which is not in lease); or betting on the sides of persons so gaming; money knowingly lent for such gaming or betting; or money lent at the time and place of such play to any person either then gaming or betting, or who shall, during the play, play or bet; is (51) an illegal consideration.

And in the case of a bill or note for money lost by gaming, a court of equity will grant an injunction to prevent the winner from parting with it. (52)

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it. In an action upon the note it was urged, that there might be great abuses if the taking a note for penalties were allowed: and Lord Ellenborough said "if there were any reason to think the law had been abused by plaintiff, he would not be allowed to enforce payment; that such a transaction was to be looked to with extreme jealousy; but that here plaintiff appeared to have acted with perfect good faith; and defendant, to whom indulgence had been extended, was not to criminate his benefactor when nothing wrong had been done." Verdict for plaintiff.

(44) Harrington v. Du Chattel, Bro. C. C. 114.

(45) Guichard v. Roberts, Blackst. 445. Banks v. Colwell, cit. 3 Term Rep. 81.

(46) 12 Ann. St. 2 c. 16. post, p. 572. note (71).

(47) 7 Geo. 2. c. 8. See Faikney v. Reynous, Burr. 2069. Petrie v. Hannay, 3 Term Rep. 418., and Steers v. Lashley, 6 Term Rep. 61. Brown v. Turner, 7 Term Rep. 630.

(48) Shirley v. Sankey and others, 2 Bos. & Pull. 130. and Atherfold v. Beard, 2 Term Rep. 610.

(49) See Scott v. Gilmore, post, p. 567.

(50) 9 Ann. c. 14. s. 9.

(51) 9 Ann. c. 14. s. 1. post, p. 571.

(52) Lloyd v. Gurdon, 2 Swanst. 180. The prayer of a bill in equity was, that three bills for 8000*l.* given by plaintiff to defendants might be delivered up to be cancelled, the bill charging that they had been given for money won at play; and plaintiff moved for an injunction to re-

A bill or note to repay a broker stock-jobbing differences he has paid, or to enable him to pay them, is bad in the broker's hands (53);

Or in the hands of any one who takes it with notice (53);

Or after it is due. (53)

But such a bill, though void by the statute to all intents and purposes, may yet be available in the hands of an innocent endorsee (54), who took it without notice of the illegality, and gave value for it.

Betting on a game at cricket (55), a horse race or (56) a

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strain defendant from parting with the bills, on the ground that though they were void in their creation, yet, if they were negotiated, the transferees must be made parties to the suit. Lord Eldon granted the injunction till answer or further order.

(53) Amory v. Merryweather, 2 Barn. & Cr. 573. Defendant employed White to gamble for him in the funds, and the difference against defendant being 500*l.*, he gave White his note for 499*l.* 10*s.* at three months' date: two years afterwards, White endorsed it for a valuable consideration to plaintiffs, and plaintiffs having threatened to sue defendant, defendant gave them a bond for the amount: plaintiffs did not know what was the consideration when they took the note, they did when they took the bond. In an action on the bond, defendant pleaded these facts, except that he stated that the note was to repay White: verdict for defendant, with leave to plaintiffs to move to enter a verdict. On a rule to show cause, the Court were clear that the facts were an answer to the action; but that the mistake in the plea prevented them from discharging the rule; they, therefore, refused to let plaintiff enter a verdict, but gave defendant leave to amend his plea on his paying the costs of the trial.

(54) Day v. Stuart, 6 Bing. 109. In an action by the holder against the drawer and endorser of a bill for 311*l.* 17*s.* 6*d.*, the defence was, that the bill had been given by the acceptor to the defendant for the amount of differences in time bargains in the public funds, and was, therefore, void under the stock-jobbing act, and an entry for the amount of the bill in the acceptor's book was read in evidence, and was as follows: "To differences in consols 311*l.* 17*s.* 6*d.*;" and one of the witnesses said, "differences" might mean "differences in point of time." Tindal C. J. left it to the jury, whether the parties meant differences in point of time, or differences between stock bought and stock sold; and they found for the plaintiff. On motion to set aside the verdict, on the ground that the entry was sufficient evidence that the bill was given for time differences, and was, therefore, void, Tindal C. J. said, "supposing that fact to be so, it was not shown that the holder had any notice of it." Rule refused. [Same point ruled in Greenland v. Dyer, 2 Mann. & Ryl. 422.]

Vide Edwards v. Dick, post, n. (81).

(55) Jeffryes v. Walter, 1 Wils. 220.

(56) Lynall v. Longbotham, 2 Wils. 36.

foot race against time, is gaming within 9 Ann.: insuring (57) in the lottery is not.

So also the (58) ransom, or money knowingly (59) lent to enable the owner to obtain the ransom, of the ship or vessel of any British subject, or of any merchandise or goods on board the same, (unless in the case of extreme necessity, to be allowed by the Court of Admiralty,) is an illegal consideration. (*q*)

[The sale of a license from the enemy to protect a ship from capture and condemnation, on a voyage to a neutral port, was held in Massachusetts to be a legal consideration for a note (*r*); but the Supreme Court of the United States has since decided that a contract for the purchase or sale of such a license is void, on account of the illegality of the consideration. (*s*)

It is not illegal for a citizen of the United States, in time of war, to draw a bill upon a subject of the enemy. (*t*)

Where a statute authorizes supplies to be sold to an enemy, a bill drawn, payable in the enemy's country, in payment of supplies furnished pursuant to the statute, is valid. (*u*)

A note given by a candidate for a public office to another

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(57) Lewis v. Piercy, 1 H. Bl. 29.

(58) 45 Geo. 3. c. 72. § 16, 17. post, p. 572.

(59) See Webb v. Brooke, post, p. 572. n. (73).

[(*q*) A bill of exchange, expressed to be for the ransom of a vessel, and given as security for the payment of the ransom bill, was held to be a contract on which an action might be sustained in a court of common law, the plaintiff and payee being an alien friend, and the capturing vessel belonging to a friendly nation. Maisonnaire v. Keating, 2 Gallison, 325. In an action upon such bill, the capture must be taken to be justifiable, and the ransom regular.]

[(*r*) Coolidge v. Inglee, 13 Mass. R. 410.]

[(*s*) Patton v. Nicholson, 3 Wheat. R. 402.]

[(*t*) United States v. Barker, 1 Paine, 156. Livingston J. who delivered the opinion of the Court in this case, considered drawing a bill upon a subject of the enemy as not trading with the enemy within the common meaning of the terms. He regarded the drawing of bills on the enemy's subjects as justified by general and long-continued practice; and in principle as unobjectionable.]

[(*u*) Where a bill, drawn in New York on a person in Great Britain during a time of war between that country and the United States, for supplies furnished by the payee to a British packet, authorized by an act of Congress (passed 6th July, 1812, 1st sess. 12th Cong. c. 129,) to sail from New York to Great Britain, was sold by the payee, and remitted by the purchaser to Great Britain for collection; in an action

person in consideration of his agreeing to give the candidate his interest at the election, is illegal and void. (*v*)

A note given by the loser to the winner of a bet on the result of an election, even after the polls are closed, is void, as being against public policy. (*w*)

A note given in consideration of any contract prohibited by statute, being founded on an illegal consideration, cannot be enforced by the party to whom it is given. (*x*)]

If a bill or note be in part upon a consideration which the law has made illegal, and in part upon a good consideration, it has been held that the illegality will taint the whole bill or note; and that the holder, if barred at all by such illegality, will be barred in toto as to his claim on the bill or note. (60)

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by the holder against the drawer, it was held that the remittance of the bill was within the protection afforded to the original transaction, and was not illegal, and that the plaintiff was equally protected with the payee who furnished the supplies. Suckley v. Furse, 15 Johns. R. 338.]

[(*v*) Swoyze v. Hull, 3 Halst. 54.]

[(*w*) Lansing v. Lansing, 8 Johns R. 354.)

[(*x*) A deputy sheriff, instead of taking bail of a defendant, took from him as indemnity the note of a third person, which the defendant endorsed. It was held that the assignment to the officer was illegal and void, being contrary to a statute of New York; and that he could not maintain an action upon the note against the maker. Strong v. Tompkins, 8 Johns. R. 76.

By the statute of Massachusetts of 1783, c. 15, the sale of shingles either not of the statute dimensions, or not surveyed, is expressly prohibited; and in each case under the penalty of forfeiture, and both buyer and seller are liable to a penalty, if they are sold without being surveyed. In an action on a note given in payment for shingles of a different quality from that required by the statute and not surveyed, the Court said, "that the shingles, for the price of which the note in suit was given, having been sold in direct violation of the statute, the consideration of the promise was clearly illegal and insufficient to support it;" and nonsuited the plaintiff. Wheeler v. Russell, 17 Mass. R. 258]

(60) Scott v. Gillmore, 3 Taunt. 226. Action against acceptor: the bill was given to the keeper of a coffee-house by the drawer, partly for money lent, and partly for spirits in small quantities, under 20*s.* worth at each time: nonsuit on the ground of 24 Geo. 2. c. 40. § 12. On motion for new trial, Mansfield C. J. said, "the statute makes the consideration illegal, not merely void, and the security is entire, and cannot be apportioned; and since it is partly given for an illegal consideration, the whole bill is void." See Spencer v. Smith, 3 Camp. 9.

Note. The case does not state whether plaintiff was endorsee: if plaintiff were the coffee-house keeper, still, as defendant was a stran-

But, if there be a privity between him and the defendant as to the good part of the consideration, he may recover that part exclusively of the bill or note. (61)

If a new bill or note be substituted for one which was given upon an illegal consideration, it will be open to the same objections as the original bill or note, unless it be reformed so as to exclude what made it illegal. (62)

If the new bill or note be so reformed as to exclude what made the first illegal, it will be unobjectionable. (63)

Thus, if a bill or note be substituted for one which was given upon an usurious contract, it will be open to the same objections as the original bill or note, if it be not confined to what remains due for principal and legal interest. (64)

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ger to the original transaction, he could not be liable otherwise than on the bill.

[See also Fleming v. Mulligan, 2 M'Cord, 173.

It has however been held in Pennsylvania, that where a note was given partly for a good and partly for an illegal consideration, it was good as to the amount of the good consideration. Yundt v. Roberts, 5 Serg. & Raw. 139.]

(61) See Robinson v. Bland, post, p. 571. note (68).

[An act of New York prohibits any persons, without authority, from becoming members of an association for the purpose of issuing notes, discounting, &c. like banks. Held that where a note was discounted by a corporation not having authority, that though the security was void, yet the corporation might recover on a count for money lent, of the person to whom the money was lent. Utica Ins. Co. v. Kip. 8 Cowen, 20.]

(62) See Chapman v. Black, infrà. Wynne v. Callander, 1 Russ, 293. [See also Tuthill v. Davis, 20 Johns. R. 285; and Fleming v. Mulligan, 2 M'Cord, 173.]

(63) See Preston v. Jackson, p. 569, note (65.)

(64) Chapman v. Black, 2 B. & A. 588. White got money from Akers upon usurious interest, and endorsed to Akers a bill for 40*l.* upon the transaction: this bill came into plaintiff's hands bonâ fide and for valuable consideration, but when it became due it was not paid, and plaintiff was apprized of the usury: it was then arranged that Akers should draw for the amount upon defendant, and that defendant should accept for the accommodation of White, which was done accordingly: nonsuit; and on rule nisi to set aside the nonsuit, and cause shown, the court thought, that as defendant really stood in the place of White, whatever would be a defence for White was also a defence for defendant; and as plaintiff's recovery in this action would enable Akers to keep the usurious interest he had received, and plaintiff by taking this new security, in which White's name was studiously omitted, was lending himself to screen Akers, the usury was a bar to this action, and the nonsuit right.

And if it were given to an endorsee of the first bill or note who took it bonâ fide and for value, he could not before 58 G. 3. c. 93. have sued any of the parties whom the usury would have protected from the first bill or note. (64)

But, a bill or note substituted for one given upon an usurious contract will be valid, if it be given for principal and legal interest only (65);

Or for what remains due for principal and legal interest, after reforming all prior payments, and excluding all usurious interest. (65)

A bill or note for the usurious interest cannot be enforced. (65)

[It has been held where all the usurious interest on a contract has been paid, that a new note given for the balance which remains due on the contract, is not infected by the usury. (*y*)]

[See also Fleming v. Mulligan, 2 M'Cord, 173; Bridge v. Hubbard, 15 Mass. R. 96.

But in Kent v. Walton, 7 Wend. 256, it was held that a new note given to a *bonâ fide* holder for valuable consideration, of a note void for usury, was valid.

So where a person owing money to B. on a usurious contract, procured C., who owed him, to give his, C.'s note, to B., for the sum due including the usurious interest, it was held that C. was liable on his note to B. Bearce v. Barstow, 9 Mass. R. 45.]

(65) Preston v. Jackson, 2 Stark. 237. Wyer lent defendant two sums on usurious interest, and took defendant's bonds for the amount: the bonds were afterwards given up, the account settled, and a note given for the usurious interest: Wyer endorsed that note to the plaintiff, and Holroyd J. held, that though a new security for principal and legal interest had been held binding, such a security for the usurious interest was not so, and he would not allow the plaintiff to recover on the note.

[(*y*) In an action by an endorsee against Watts, the maker of a note endorsed by Lancaster, the defence set up was usury. Watts had made a note to Lancaster and another person, on which interest at the rate of 12 per cent. was to be paid. He made several payments on this note amounting to more than the interest, and it was then cancelled, and he gave a new note to Lancaster for the balance, on which only lawful interest was paid. After several payments on this note, Watts gave the note declared on, for the balance remaining due to Lancaster. Sewall C. J. giving the opinion of the court, said, that there was no pretence that the note in suit included unlawful interest; and the defendant was defaulted. Chadbourn v. Watts, 10 Mass. R. 121.

And in State Bank of Elizabeth v. Ayers, 2 South R. 130, where a party to a note infected by usury, paid a part in cash and gave a new

If a bill or note be given in part upon a legal, and in part upon an illegal, consideration, and several bills or notes be afterwards substituted in lieu thereof, the effect of the illegality may be confined to some only of the substituted bills or notes, and the others may stand exempt. (66)

As, where a bill or note is given as to half for a gaming debt, and as to the residue for money lent, and two bills or notes of equal amount are afterwards substituted for it, if the giver do any thing which may be considered an election to ascribe the gaming debt to the one, he will be liable upon the other. (66)

Promising to pay one whilst both remain unpaid, shall be deemed an election to ascribe the gaming debt to the other. (66)

But it is no objection to a bill or note that it was drawn in order to be discounted, and that the brokerage for getting it discounted was exorbitant, if the broker did not discount it himself, and the person who did knew nothing of his charge. (67)

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note for the residue, it was held that the new note was not infected by the usury, though the holder to whom it was given was a virtual party to the usury. State Bank of Elizabeth v. Ayers, 2 South R. 130.]

(66) Hubner v. Richardson, Mich. 1819. Richardson lost to Brown at gaming 90*l.* and owed him other money; and for upwards of 20*l.* of the gaming debt, and upwards of 70*l.* of the other, gave him a 100*l.* note: he paid part, and then gave Brown two notes for 43*l.* each, one of which was endorsed to plaintiff for a valuable consideration, and plaintiff knew nothing of the gaming debt; defendant promised him payment: and in an action on the note, Case, on question whether the gaming consideration vitiated the note in plaintiff's hands; and after argument, the court held it did not; for, it was for defendant to make out that some of the gaming debt made part of the consideration of this note: it might be wholly included in the other note, which did not appear to have been paid, and defendant's promise to pay this implied an election on his part that it should be included in the other.

[Where a bill and note were given in discharge of an account, part of which was illegal, it was held in an action on both the bill and note, that the plaintiff might recover on either the bill or note, neither exceeding the amount of the legal part of the account. Crookshank v. Rose, 5 Car. & P. 19; 1 N. & Rob. 100.]

(67) See Ackland v. Pearce, 2 Campb. 599. Young v. Wright, 1 Campb. 139. Dagnall v. Wigley, 11 East 43. [Coster v. Dilworth, 8 Cowen, 299. Barretto v. Snowden, 5 Wend. 181. See ex parte Goss, 2 Deac. & Chit. 240.]

[If B. be indebted to A., and C. be indebted to B. on an illegal consideration, as for money won at cards, and A. agrees with B. to take his pay of C. and discharge B., who gives up his claim against C., a note given by C. to A. in pursuance of this agreement is valid. (*z*)

A bill drawn for the purpose of getting it discounted, and with the proceeds to pay a prior bill which is usurious, is not affected by the usury. (*a*)]

The objection of illegality of consideration is in some cases confined to those persons who were parties or privy to such illegality, and those to whom they have passed the bill or note without value; in other cases it is extended even to holders bonâ fide, and for value.

The latter cases are, where the consideration is, either (68) wholly or in part, (69) signing a bankrupt's certificate; money (70) lost by gaming as aforesaid, or by betting on the sides of

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[(*z*) Bowen v. Doggett, 2 Nott & M'Cord, 127.]

[(*a*) Marchant v. Dodgin, 2 M. & Scott, 632.]

(68) Robinson v. Bland, Burr. 1077. A bill of exchange was partly for money lent at the time and place of play, and partly for money lost at play: and on a case reserved, the court held that the plaintiff could recover nothing upon the bill, but that he might recover the money lent, on a count for money lent.

(69) Vide 6 Geo. 4. c. 16. s. 125. antè, p. 558. note (28).

(70) By 9 Ann. c. 14. s. 1., it is enacted, that all notes, bills, or other securities whatsoever, given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever, won by gaming, or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever.

Bowyer v. Bampton, Str. 1155. Several notes, given by Bampton to Church for money lent to game with, were endorsed by Church to the plaintiff for a full and valuable consideration, and the plaintiff had no knowledge that any part of the consideration from Church to Bampton was money lent for gaming; and after two arguments upon a case reserved, the court held that the plaintiff could not maintain the action; for, it would be making the notes of use to the lender, if he could pay his debts with them, and it would tend to evade the act, on account of the difficulty of proving notice on an endorsee; and the plaintiff would not be without remedy, for he might sue Church on his endorsement,

persons so gaming; money knowingly lent for such gaming or betting; money lent at the time and place of such play to any person either then gaming or betting, or who shall, during the play, play or bet; [money lost by betting on a horse race; (*b*)] money lent (71) on an usurious contract; the (72) ransom, or money knowingly (73) lent to enable the owner to obtain the ransom of the ship or vessel of any British subject, or any merchandise or goods on board the same, as before mentioned.

[(*b*) Shillito v. Theed, 7 Bing. 405; S. C. M. & P. 303; 5 C. & P. 303.]

(71) Sed vide p. 574, n. (75.)

By 12 Ann. st. 2. c. 16., it is enacted, "that no person or persons whatsoever, upon any contract, take directly or indirectly, for loan of any moneys, wares, merchandise, or other commodities whatsoever, above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, made after the time aforesaid, for payment of any principal, or money to be lent, or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred, as aforesaid, shall be utterly void."

Lowe v. Waller, Dougl. 708—736. The defendant was acceptor of a bill, which he gave to Harris and Stratton upon an usurious contract; Harris and Stratton endorsed it to the plaintiff for a valuable consideration, and the plaintiff had no notice of the usury; upon a case reserved, the question was, whether the usury between Harris and Stratton and the defendant was a defence against an endorsee who took the bill bonâ fide, and paid a valuable consideration for it; and after time taken to consider, the Court held it was; and though Lord Mansfield had a wish the law should turn out in favor of the plaintiff, the Court found the words of the act too strong, and could not get over the case of Bowyer v. Bampton, Str. 1155, suprà, n. (70).

[See also Levy v. Gadsby, 3 Cranch, 180.]

(72) By 45 Geo. 3. c. 72. (which repeals the former act 43 Geo. 3. c. 160. relating to the same subject) sect. 16., it is enacted, "That it shall not be lawful for any of his Majesty's subjects to ransom, or to enter into any contract or agreement for ransoming, any ship or vessel belonging to any of his Majesty's subjects, or any merchandise or goods on board the same, which shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against his Majesty's subjects, unless in the case of extreme necessity to be allowed by the Court of Admiralty."

And by sect. 17. "All contracts and agreements which shall be entered into, and all bills, notes, and other securities which shall be given by any person or persons for ransom of any ship or vessel, or of any merchandise or goods on board the same, contrary to this act, shall be absolutely null and void in law, and of no effect whatsoever."

(73) Webb v. Brooke, 3 Taunt. 6. The plaintiff and defendant (British subjects) were made prisoners by the French at Oporto, where the

[Illegality in the consideration for which a bill or note is made, is no defence against an action upon it by a *bonâ fide* holder for a valuable consideration, except in those cases where it is made void by statute. (*c*)]

Where usury is the defence, letters between the parties at the time the bill or note is given, to fix the usurer's terms (74),

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defendant's ship was at the same time taken; they jointly petitioned for the release of themselves, and for the ransom of the defendant's ship, and to enable the defendant to pay for the ransom, the plaintiff lent him 3000 dollars, and for this sum the defendant drew a bill in his own favor, which he endorsed to the plaintiff. Their liberation and the ransom were accordingly effected, and they returned (as had been agreed upon) in the ship to England. The drawee refused to accept the bill, and this action was brought against the defendant as endorser. The defence was, the illegality of the purpose for which the money was lent. A verdict was found for the plaintiff, and the point of law reserved. And after a rule nisi to enter a nonsuit, and cause shown, Mansfield C. J. said, "there is a manifest distinction between the cases of Faikney v. Reynous, and Petrie v. Hannay, and the other cases, in which a man having a debt of honor borrows money to pay it, and those cases where the plaintiff previously advances the money for effectuating an illegal transaction, or causing it to be done. Here the plaintiff and the defendant are equally ransomers; equally solicitous to procure the ransom, for they were to return home by this ship. The ransom is as much the deed of the plaintiff as of the defendant." Rule absolute.

[(*c*) Gould v. Armstrong, 2 Hall, 266. See also Vallett v. Parker, 6 Wend. 615.

See also City Bank of New York v. Barnard, 1 Hall, 70. Where certain directors of a bank borrowed money of the bank, on their own notes with endorsers, for the purpose of employing the money in an illegal manner, it was held that the notes were valid against the endorsers; that the knowledge of the directors who discounted the note, in their private capacity, of the illegal transaction in which the notes originated, did not prevent the bank from being considered a bonâ fide holder of the notes.

The Court in South Carolina, (in 1792,) say that there is no difference between a note void by common law or by statute, for illegality of consideration; and that a *bonâ fide* endorsee of a note, void at common law for illegality and turpitude in the consideration, could not maintain a suit upon it against the maker. 1 Bay, 249. See also Wiggin v. Bush, antè, p. 561. But the law, as stated in the text, is well settled.]

(74) Kent v. Lowen, 1 Campb. N. P. C. 177, 180. d. This was an action against the maker of a note, endorsed by the payees to Watson, and by him to the plaintiff. The defence was, usury in the original consideration for the note; to prove which, the defendant tendered letters from the payees to the defendant setting forth the consideration. Lord Ellenborough held that it was first necessary to show, either by the post-mark or otherwise, that the letters were contemporaneous with the making of the note, after which, they would be evidence of an act done by the payees through whom the plaintiff claimed. From the

are admissible in evidence against a subsequent holder, if the usury be as against him a valid defence.

But, now, 58 Geo. 3. c. 93., removes the objection of usury from an endorsee for valuable consideration, if he were ignorant of the usury at the time he took the bill or note and gave the consideration. (75) (*d*)

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post-mark it appeared that they had been written just before the date of the note, and they were read in evidence. The defendant had a verdict; and on a motion for a new trial, the Court held that the letters had been properly received.

(75) By 58 Geo. 3. c. 93., no bill or note that shall be made after 10*th* June, 1818, shall, though it may have been given for an usurious consideration, or upon an usurious contract, be void in the hands of an endorsee for valuable consideration, unless such endorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill or note had been originally given for an usurious consideration, or upon an usurious contract.

[(*d*) In New Hampshire, the maker of a note including in it usurious interest reserved upon the remaining part of the note, cannot set that up as a defence in an action by a *bonâ fide* endorsee, the statute of this State of February 12, 1791, not declaring the contract void, but only prohibiting the taking of more than six per cent. interest. The Court said, that if the action had been brought by the original payee, the illegal interest would have been deducted. Young v. Bradley, 2 N. H. Rep. 410.

In Massachusetts, by statute, 1825, c. 143, no contract or assurance is rendered void on account of usurious interest being taken or reserved upon it.

By a later statute the plaintiff, in an action on such contract or assurance is liable to forfeit three times the amount of the whole interest reserved or taken; and if the interest be paid, three times the whole amount may be recovered back by action. St. 1826, c. 27, s. 1.

The oath of the maker of a note to prove that it was given on a usurious consideration, which was permitted in Massachusetts by statute, 1783, c. 55. s. 2, is only admissible where the original party to the usurious consideration is plaintiff; and it is not admissible even where the plaintiff is a mere trustee for the original creditor, the party to the usurious consideration. Binney v. Merchant, 6 Mass. R. 190.

The last statute of 1826, allows the defendant to be a witness to prove the usury. Probably the construction of this statute would be similar.

By the statute of New York, since January 1, 1830, usury is no defence in a suit on a bill or note, in the hands of an endorsee or holder, who has "received the same in good faith and for valuable consideration, and who had not at the time of discounting such bill or note, or paying such consideration for the same, actual notice that such bill or note had been originally given for an usurious consideration, or upon an usurious contract." 1 R. S. of N. Y. 772, s. 5.

In the construction of this law it is held, that usury may be set up as a defence, unless the plaintiff received it, not only bonâ fide and for a valuable consideration, but also before it became due. Hackley v. Sprague, 10 Wend. 113.

It is for the endorsee, however, who sues upon an usurious bill or note, to prove that he is an endorsee for value. (76)

And this he must do, though he have had no notice to prove the consideration of the endorsement to him. (76)

[Where a note is rendered void by reason of usury, a verbal agreement to pay usurious interest upon a note, which, on the face of it, only reserves legal interest, does not render the note void, for evidence of the parol agreement cannot be received to alter the written contract. (*e*)

If a bill or note be made for the purpose of raising money upon it, and it is discounted at a higher premium than the legal rate of interest, and where none of the parties whose names are on it could, as between themselves, maintain a suit on the bill or note when it becomes due, provided it had not been discounted, then such discounting the bill is usurious, and the bill void, where the law makes a bill or note void for usury. (*f*)

This statute does not apply to a note made before it was passed. Hackley v. Sprague, 10 Wend. 113.]

(76) Wyatt v. Campbell, 1 Moody & Malkin, 80. In an action by the endorsee of a note it appeared that a prior endorser had discounted it usuriously, and plaintiff was, therefore, called upon to prove the consideration of the endorsement to him: he had had no previous notice to prove it, and insisted he was not bound to do so: but Lord Tenterden said that "58 Geo. 3. made notes tainted with usury valid in the hands only of a bonâ fide holder (that is, an innocent holder for value); the onus, therefore, to prove himself such was upon plaintiff, and if he did not, the statute did not apply." Plaintiff did not establish a consideration, and defendant had a verdict.

[(*e*) Butterfield v. Kidder, 8 Pick. 512. This action was on a note made in Massachusetts, before the old usury law, st. 1783, c. 55, was repealed.]

[*f*) Munn v. Commission Company, 15 Johns. R. 44; Cockey v. Forrest, 3 Gill & Johns. 482. See also Powell v. Waters, 17 Johns. R. 176; Levy v. Gadsby, 3 Cranch, 180; Marvin v. M'Cullum, 20 Johns. R. 288; Fleming v. Mulligan, 2 M'Cord, 173; Saneuein v. Brunner, 1 Har. & Gill, 477: Brunner v. Wilks. 2 M'Cord, 178.

Roosevelt endorsed a note made by Mark and Co. for their accommodation, this note Goodrich discounted for Mark and Co. at a usurious rate of interest. In an action by an endorsee to whom Goodrich had passed it against Roosevelt, the Court held that the note was usurious and void. Radcliff J. "Notwithstanding the note was made payable to Roosevelt, and endorsed by him, it was essentially an usurious contract between Mark and Co. on the one part, and Goodrich on the other, and as between them, was closely founded on usury and void. Wilkie v. Roosevelt, 3 Johns. Cas. 66.

A. and B. exchanged their own notes with each other; each party

It seems, that discounting the bill or note in such case is usurious, whether the person discounting it knew it to be a note before unavailable, or not. (*g*)

But where the original consideration for which a bill or note is given is good, and it is afterwards sold at a greater discount than the legal rate, this is no defence in an action against the maker by a purchaser. (*h*)

And where a note originally given for a good consideration, is sold by the payee at a discount greater than the legal rate of interest, he endorsing it, he cannot set up usury as a defence in an action against him by the party to whom he endorsed it. The note being valid in the hands of the payee, he had a right to sell it like any other property, and his col-

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agreeing to pay the note of which he was maker. A., in order to raise money, had the note signed by B. discounted at a premium exceeding the lawful rate of interest. Held, that the transaction was not usurious, and could not be set up as a defence to an action brought by the purchaser of the note against B. Rice v. Mather, 3 Wend. 62.

Where a note signed by the maker for the payee's accommodation, is transferred by the latter, as security for a usurious loan to himself, the note is usurious, and in New York was formerly void. Fulton Bank v. Benedict, 1 Hall, 401; Bennet v. Smith, 15 Johns. R. 355.

See Henderson v. Benson, ante; Townsend v. Bush, 1 Conn. R. 260.]

[(*g*) Powell v. Waters, 8 Cowen, 966. But see Taylor v. Bruce, Gilmer, 42.

A note made and endorsed for the purpose of having it fairly discounted, if discounted by any person at a usurious rate, was void in New York. Powell v. Waters, 8 Cowen, 669.]

[(*h*) H. Ruggles drew a bill in favor of O. Ruggles on Darling, agent of the Commission Company, which was accepted by the drawee. O. Ruggles sold the bill by a broker, deducting more than the legal rate of interest, and endorsed the bill, but there was no evidence of any usurious agreement between O. Ruggles and H. Ruggles or Darling. Spencer J. giving the opinion of the Court, said, "The bill, while in the hands of O. Ruggles and before it was discounted by the plaintiffs, was a perfect and available bill, and when it became due, he could have maintained an action upon it, against either the defendants or H. Ruggles, the drawer. The principle is too well settled to be questioned, that a bill free from usury in its concoction, may be sold at a discount, by allowing the purchaser to pay less for it than it could amount to at the legal rate of interest for the time the bill has to run." Judgment for the plaintiffs. Munn v. Commission Company, 15 Johns. R. 44. S. P. Kent v. Walton, 7 Wend. 256; Knights v. Putnam, 3 Pick. 184.

See also Powell v. Waters, 8 Cowen, 669; and the opinion of Jackson J. in Bridge v. Hubbard, 15 Mass. R. 96.]

lateral or provisional contract as endorser did not change the nature of the transaction. (*i*)

But in such an action the whole amount due on the note cannot be recovered, but only the amount for which it was purchased with legal interest on it. (*k*)

It is a question to be submitted to the jury in such a case whether the transaction was a bonâ fide sale of the note, or a device to evade the statute of usury. (*i*) (*k*)

In an action by the holder of a bill or note purchased by him at a greater discount than the legal interest, against any other party beside the one from whom he purchased, he can recover the full amount expressed to be due on it. (*l*)

Where a note is made and placed in a person's hands as collateral security for a debt, with a right to sell it, if the debt be not paid on a certain day, if the holder sell the note at a discount greater than the legal rate of interest, without endorsing it, the transaction is not usurious. (*m*)]

If the consideration upon which a bill or note was made be not illegal, an illegality in the consideration upon which it is afterwards transferred will be no (77) defence, if the plaintiff took it bonâ fide, and upon a good consideration, and if he be not bound in making out his title to state or prove the signature of the person making such transfer.

Where he is bound to state or prove such signature, the authorities are contradictory upon the question whether the illegality is a defence or not.

[(*i*) Nichols v. Fearson, 7 Pet. S. C. R. 103. Mr. Justice Johnson, who delivered the opinion of the Court, intimated that if the transaction were a loan to the endorser, then he might maintain the defence of usury.]

[(*k*) Cram v. Hendricks, 7 Wend. 569.

In Louisiana, where the payee sells a note at a discount, endorsing his name, and stating the rate at which he sells it, it seems he is not liable as endorser, but the sale is valid as transferring all claim on the note against the maker. Romero v. Segura, 7 La. R. 307.]

[(*l*) Murray v. Judah, 6 Cowen, 484.]

[(*m*) Tuttle v. Clark, 4 Conn. R. 153. Defendant put his note, endorsed by two others as collateral security for an execution held by the sheriff against him, to be sold at the end of ten days, if the execution should not be paid in the mean time. He sold, at the end of the ten days, at a discount over legal interest, without endorsing it. In an action by holders to whom he sold the note, it was held not to be usurious.]

(77) Daniel v. Cartony, post, p. 578; [Burt v. Gwinn, 4 Har. & John. 507.]

If the bill or note were originally given upon an unobjectionable consideration, but endorsed over by the payee upon an illegal consideration, Lord Kenyon thought a subsequent endorsee, if he took the bill bonâ fide and upon a valuable consideration, was entitled to keep it in opposition to such payee; (78)

And to enforce payment in case of a bill, against the acceptor. (79)

In Lord Ellenborough's time, the Court of King's Bench thought he could not enforce such payment. (80)

It is no objection in an action against an endorser, that the bill or note was drawn upon a gaming, or usurious, or other

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78) Parr v. Eliason, 1 East's Rep. 92. A bill was drawn in favor of the plaintiff; he endorsed it to Persent and Bodeker upon an usurious consideration, and they endorsed it over: it was afterwards endorsed back to the assignees of Persent and Bodeker, who had become bankrupts, for a debt due to their estate; upon which, the plaintiff brought trover to recover back the bill. Lord Kenyon directed a nonsuit, and after a rule nisi for a new trial, the Court held that as the bill was originally good, and as the endorsement by Persent and Bodeker was unimpeached, their endorsee had a good right to the bill, and that right was transferred to the defendants. Rule discharged.

(79) Daniel v. Cartony, Espinasse, 274. Scott drew a bill on the defendant, payable to his own order, and discounted it with Greensill, who took 18*l.* per cent. discount; it was afterwards endorsed to the plaintiff, and the defendant could not impeach *that* transaction; and per Lord Kenyon, "This is no defence; had the note been originally given on an usurious transaction, or for an usurious consideration, it would have been void in the hands of even a bonâ fide holder; but usury in an intermediate transaction respecting it can never make it void in the hands of a bonâ fide endorsee, where there was no usury in the original transaction."

(80) Lowes v. Massaredo, 1 Stark. 385. In an action by endorsees against acceptor on a bill payable to Lowes or order, it appeared that Lowes endorsed it to Bloxham upon usurious terms, that Bloxham endorsed it to Ambrose, and that Ambrose endorsed it to the plaintiffs upon questionable terms; Lord Ellenborough thought plaintiffs precluded from recovery by the usury between Bloxham and Lowes, independent of the usury between them and Ambrose; but, upon being strongly pressed by Parr v. Eliason, he suffered plaintiffs to take a verdict, subject to a motion for entering a nonsuit: a rule nisi was accordingly granted, and on cause shown, the Court thought the usury between Bloxham and Lowes a bar to the plaintiff's claim; because they could not bring themselves in connexion with the defendant but through the medium of Lowes' endorsement, which was tainted with usury: they also thought the terms upon which Ambrose endorsed to the plaintiffs usurious, and the rule for a nonsuit was made absolute.

[But see Munn v. Commission Company, antè, p. 576.]

illegal consideration; for, though the statute against gaming, &c. make such bill void to all intents and purposes, the proper construction upon those words is, that it makes it void as far as can be necessary to further the objects of the act, but it does not avoid it in favor of a party whom the statute meant to punish, not to protect. (81)

[The issuing of bills or notes intended to be circulated like bank notes, is, in some of the States, prohibited by statute, to all persons and corporations except incorporated banks. (*n*)

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(81) Edwards v. Dick, 4 B. & A. 212. Action on bill drawn by defendant on Lord Rossmere, payable to defendant's order, and endorsed by him; defence, that defendant drew the bill for money won by him of Lord Rossmere at play. Bayley J. thought this no defence; because, by endorsing the bill defendant affirmed it to be free from exception, with which this defence was inconsistent, and he rejected the evidence. On motion for new trial, the Court thought he did right, for defendant was not within the spirit of the act against gaming; it was not for a person standing as he did that the act intended protection; compelling payment from him was not advancing any practice the statute meant to suppress; and giving him protection would assist a winner, whom the act meant to discountenance, and would enable him to set up his own misconduct to bar the honest claim of an innocent endorsee. Rule refused.

[So in Indiana it is held that in an action by the assignee of a note against the assignor, it is no defence that the note was given by the maker to the assignor for an illegal consideration. Johnston v. Dickson, 1 Ind. R. 256]

[(*n*) The statute of Pennsylvania of March 19th, 1810, declared it unlawful for any unincorporated association of persons to perform the operations of banking, or to loan money on any note, and unlawful for any person to offer any note for discount at any such bank. It seems that the endorser of a note discounted by such an association, and who has taken it up, cannot maintain an action on account of it against the maker of the note. Myers v. Irwin, 2 Serg. and Raw. 368.

The act of Pennsylvania of 21st March, 1814, made all notes in the nature of bank notes issued after January 1, 1815, issued by any unincorporated bank, null and void, and "irrecoverable in any court." By the statute of 22d March, 1817, so much of any act as prevents the holder of such a note from recovering upon it against the bank, association, or partnership, is repealed. The Supreme Court of Pennsylvania held that notes in the nature of bank notes, issued by an unincorporated association between 1st January, 1815 and 22d March, 1817, might be recovered upon in a suit against the members of the association as partners. Hess v. Werts, 4 Serg. and Raw. 356. Though such notes contain a promise to pay "out of their joint funds, according to their articles of association," yet the members are personally liable. Ib.

The statute of Massachusetts, 1804, c. 58, s. 1, enacts that all bills, notes, &c. under five dollars, payable to bearer or order, shall be wholly in writing; and that all bills, notes, &c. under that amount and

It is no bar to an action on a bill or note, that it was made on Sunday. (*o*)

In an action against the maker of a note endorsed after it was due, where the defendant had confessed judgment, the Court refused to set aside the judgment to let in a defence of the illegality of the consideration of the note, where both parties to the original contract were in *pari delicto*. (*p*)]

Another ground of defence to an action on a bill or note is, that it had been stolen or lost, or unlawfully obtained, and that plaintiff had taken it without proper caution. (82)

To make out that it had been stolen or lost, it is not necessary defendant should give positive evidence of the theft or loss, if he were the person from whom it was stolen, or by whom it was lost; for, that may lie in his own knowledge only: proof that he took the steps a man naturally would take in case

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so payable, issued after April 1, 1805, and having the impression of types, plates, or printing, shall be utterly void, and no action shall be thereon sustained in any court of law. In an action on printed or engraved notes payable to bearer, each for less than $5, but dated previously to April 1, 1805, it was held that evidence that the notes were issued after that date was admissible, and constituted a good defence to the action. Bayley v. Taber, 5 Mass. R. 286.]

[(*o*) Begbie v. Levi, 1 Crom. & Jer. 180; Geer v. Putnam, 10 Mass. R. 312. See also Smith v. De Fontaine, 1 Taunt. 131. The contrary has been held in Connecticut. 1 Root, 474. See also 1 Root, 98 and 145.]

[(*p*) Sebring v. Rathbun, 1 Johns. Cas. 331.]

(82) See Miller v. Race, and Grant v. Vaughan, antè, p. 112. n. (24), and Peacock v. Rhodes, antè, p. 104, n. (12).

Solomons v. the Bank of England, 13 East's Rep. 135. n. Trover for a bank note for 500*l*. It appeared that the note had been fraudulently obtained by means of a forged draft, and therefore when presented for payment it was stopped by the bank, who informed the plaintiff of the circumstances. The plaintiff had received it from his correspondent at Middleburg, and by desire of the bank, wrote to them to learn how they came by it. In answer, they wrote that they had received it, in payment for goods, from a stranger. The note was three years old, and was stated by the plaintiff to have been taken by him in reduction of a balance due to him from his correspondents, but how this was did not appear. Bank notes of this value were not usually current at Middleburgh. Lord Kenyon said, that as it did not appear that the plaintiff had given a valuable consideration for the note before notice, he should consider him as agent to his correspondents, and he thought that they had not satisfactorily accounted for their possession of the note. The plaintiff consented to a nonsuit; and on a rule nisi to set it aside and cause shown, the Court refused to interfere. See Lowndes v. Anderson, 13 East's Rep. 130.

Gill v. Cubitt, 3 Barn. & Cres. 466. In an action by endorsee against acceptor, it appeared a bill had been stolen out of a parcel, and plaintiff was, therefore, called upon to prove under what circumstances he took it: he proved that he was himself a bill broker, that the bill was brought in his absence to his clerk for discount: that it was brought between nine and ten in the morning: that the clerk thought he knew the features of the man who brought it from having seen him before, but he did not know his name or where he lived: the clerk desired him to leave the bill, that he might inquire as to the names upon the bill, and call again: that the inquiry was made, the man called again in two hours and got the money, and by the clerk's desire put his name upon the bill. The clerk did not ask the man his name, or where he lived, or on whose account he came, or where he got the bill: and it was not the practice in plaintiff's office to inquire about the drawer or any other party, if the acceptors were good. Abbott C. J. asked the jury, what they would think if a board were put over plaintiff's door, "Bills discounted for persons whose features are known, and no questions asked," (and the Court thought the facts warranted the question,) and he left it to the jury, whether it was proper caution to discount a bill for a man whose name and residence were unknown, and intimated pretty strongly it was not; the jury found for defendant, and on rule nisi for new trial and cause shown, the Court thought the case properly left to the jury, and the conclusion drawn by the jury right: rule discharged.

Snow and others v. Peacock, 2 Car. & P. 215. 3 Bing. 406. In trover for a 500*l.* Bank of England note, it appeared that in September 1824, plaintiffs' porter was robbed of it. Plaintiffs made immediate complaint at Bow Street, had hand-bills and placards published, gave notice to stop payment at the bank, and advertised the number, date, and amount in the Hue and Cry, (a paper circulated by the Home Secretary of State for giving notice of offences.) In April 1825, it was taken to the bank at Bourne in Lincolnshire by a respectable looking man, who had arrived at Bourne two hours before by the London mail. A clerk at the bank asked the prisoner's name, and then gave him the amount in notes of the bank; he asked no other questions. The clerk, in a service of eleven years, had never changed a note so large as 200*l.* Best C. J. left it to the jury, whether plaintiff had acted with due diligence in circulating intelligence of the robbery, and whether defendant's clerk had exercised sufficient caution and observed the usual course of business in giving change for the note. The jury found for plaintiffs, but added that they had not the slightest suspicion of defendant's motives. A new trial was applied for on the ground that the proper question for the jury was whether defendant had acted bonâ fide, but after cause shown, the Court held the proper question was, whether defendants had used sufficient caution, and the rule for a new trial was discharged.

Beckwith v. Corrall, 3 Bing. 444. 23d December, plaintiff was robbed of his pocket-book, containing (among other things) a bill accepted by Remington and Co., and endorsed in blank by the payee. On 26th December, he advertised the loss of the pocket-book, but said nothing as to the bill, and on the contrary stated, that the contents were of no use but to the owner. On the 30th, he gave notice to Remington and Co. and desired them to stop the bill. In the mean time, viz. on 29th, two young men, strangers, went to defendant's bank at Maidstone, and asked to have the bill cashed. One of them said he was the endorser's son; defendant cashed the bill, and plaintiff brought trover. Best C.

of theft or loss, will furnish ground for a jury to conclude it had been stolen or lost. (83)

And though there be positive evidence of the theft or loss, the defendant should be prepared to show that proper steps

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J. put it to the jury, whether plaintiff used due diligence in apprizing the public of the loss, and whether defendant had acted with good faith and sufficient caution in taking the bill. The jury found for the defendant. Motion for new trial, on the ground that the only proper question was, whether defendant had used due caution and acted *bonâ fide*, and that it was immaterial whether plaintiff had used due diligence or not. But the Court thought plaintiff bound to give notice of his loss as extensively as possible; here he had rather misled than cautioned the public. Rule refused.

Down v. Halling, 4 Barn. and Cres. 330. 16th November, plaintiff's broker gave plaintiff a check upon Pole and Co. bankers, for 50*l.*: 22d November, between four and five, P. M., a woman of respectable appearance bought goods of defendants, wholesale linen drapers and haberdashers, to the amount of 6*l.* 10*s.*, and gave them this check: they asked her name and wrote it down, and gave her the change: the next day they presented it for payment, and the bankers paid it. On the 25th, plaintiff gave notice to the bankers not to pay it, but finding it had been paid, called on defendant, and brought this action for money had and received. Abbott C. J. left it to the jury, whether defendants had not taken the check under circumstances which should have excited the suspicion of a prudent man, and they found for defendant. On motion for new trial, the Court were satisfied that if this was to be considered as lost by plaintiff or stolen from him, defendant, who took it so long after its date, must be considered as having taken it at his peril: they, however, doubted whether plaintiff should not have given some evidence of losing the check; but, on time to consider on that point, they thought a person who took such a check under such circumstances was bound to show that the party from whom he took it had good title to it; and Abbott C. J. remarked that the party who lost it might in many instances be unable to prove such loss. Rule refused.

[Vairin v. Hobson, 8 La. R. 50. Action against the drawers of a check. The owner of the check, which was on a bank in New Orleans, payable at sight, having lost it by accident, it was sold at St. Louis, fifteen hundred miles from New Orleans, twenty-five days after the date, by a passenger in a steam-boat, to Maynard, a respectable merchant of New Orleans, who was a passenger in the same boat, for its full value in goods and money. Maynard sold the check to the plaintiffs without endorsing it, at five per cent. discount, at the same time informing them of the circumstances under which he had taken it. It was held that the circumstances under which the check came into the plaintiff's possession were so suspicious, that they ought not to have purchased it without further inquiry, and therefore that they were not entitled to recover.

See also Dupeux v. Troxler, 8 La. R. 92.]

(83) See Down v. Halling, *supra*.

were taken to notify the theft or loss, and to put the public on their guard; for, want of diligence in this respect may take away from the loser the right of imputing want of proper caution to the plaintiff (84);

Or, at least, it will weaken the defence.

A fortiori will it, if the loser in the steps he takes do what might rather allay suspicion as to the bill or note in question, than raise it. (85)

As, if he stated that he had lost a parcel, or pocket-book, &c., and that the contents were of no use but to the owner. (85)

In case of a bank-note, notice at the bank to stop it, advertising in the Hue and Cry, and distributing placards in London and its vicinity (where the loss is in London), and amongst many country bankers (though not all) is sufficient to exempt the loser from the charge of negligence. (86)

And it will make no difference, though plaintiff were a country banker, to whom no placard was sent.

If the loss be made out, the burden of proof that he or some one under whom he claims gave a valuable consideration for it, and took it under circumstances in which no want of proper caution is imputable, lies upon the plaintiff. (87)

Want of proper caution is the proper point for consideration: it is not necessary there should be mala fides. (88)

And it is for a jury to say whether there has been proper caution or not. (89)

The amount of the bill or note may be proper for consideration in judging of the want of caution: greater caution may be expected upon a large bill or note than upon a small one. (90)

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(84) See Snow v. Peacock, and Beckwith v. Corrall, antè, p. 581. [See also Strange v. Wigney, 4 M. & P. 476; S. C. 6 Bing. 677.]

(85) See Beckwith v. Corrall, antè, p. 581.

(86) See Snow v. Peacock, antè, p. 581.

(87) See Down v. Halling, suprà.

(88) See Snow v. Peacock, and Gill v. Cubitt, suprà. [But see Foster v. Pearson, and Stephens v. Foster, 1 Cromp. Mee. & R. 849.]

(89) See Gill v. Cubitt, suprà. Rothschild v. Corney, infrà., [and Strange v. Wigney, 4 M. & P. 470.]

(90) See Snow v. Peacock, suprà; [and Strange v. Wigney, 4 M. & P. 470.]

In case of a check upon a banker, the date of the check may be proper for consideration: greater caution may be thought right if the check be of several days' standing, than if it be taken within a day or two of the date. (91)

There is not necessarily want of caution in taking a check upon a banker five days after the date. (92)

Although it have "and Co." written across it, to intimate it to be paid to a banker. (92)

If, therefore, the jury find that those circumstances were not such as ought to have excited the suspicion of prudent men, their verdict cannot be impeached. (92)

Discounting for a man whose name and residence are unknown, and who is only known by his features to the person discounting it, may be deemed want of caution. (93)

And so may discounting for a stranger who only gives his name. (94)

Especially, if the bill or note discounted be of large amount. (95)

[So, if the holder of a bill cannot tell from whom he received it, he cannot hold it against the person who lost it. (*o*)

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(91) See Down v. Halling. Solomons v. Bank of England, suprà. [See also Vairin v. Hobson, suprà.]

(92) Rothschild v. Corney, 9 Barn. & Cres. 388. Brady, a wine merchant and cooper, had in his possession, 24th January, two checks of plaintiff's upon his bankers for 1330*l.*, dated 19th January, with "and Co." written across them. Brady applied to one of the defendants to give him cash for them, on the ground that he (Brady) had no banker, which defendant had, and from the "and Co." written across, they must be presented through a banker. This defendant knew Brady by person, but not his residence, and gave him the amount, and paid the checks to Remington and Co., their bankers, who got the amount from Masterman and Co., plaintiffs' bankers; it was then discovered that these checks had been obtained from plaintiff by fraud, and he brought this action to recover back the money. Lord Tenterden left it to the jury whether the circumstances were such as ought to have excited the suspicions of prudent men, and whether defendants had acted with reasonable caution. The jury found for defendants, and on motion for a new trial, the Court said, the question presented to the jury was the right one, and they could not say they had come to a wrong conclusion.

(93) See Gill v. Cubitt, antè, p. 581.

(94) See Snow v. Peacock, antè, p. 581. Solomons v. Bank of England, antè, p. 580.

(95) See Snow v. Peacock, and Solomons v. Bank of England, suprà.

[(*o*) Easley v. Crockford, 10 Bing. 243. In trover for a bank note

Where a bill or note has been stolen or lost, it is not merely a ground of defence that it was taken without proper caution, but where the party has obtained payment upon it, he may be made to refund. (96)

And if he still have the bill or note in his possession, he may be made to give it up. (97)

Another ground of defence to an action on a bill or note, is indulgence to a party to whom defendant, if he paid, would be entitled to look for reimbursement. (98)

But, indulgence pending the action cannot be given in evidence upon the general issue (99);

It must be specially pleaded. (99)

And so must any other ground of defence which arises after the action brought.

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of 200*l.* stolen from plaintiff, defendant said he received it on a bet at the Derby, but could not tell from whom. Held plaintiff entitled to recover.]

(96) See Down v. Halling, ante, p. 582.

(97) See Snow v. Peacock, and Beckwith v. Corrall, ante, p. 581.; and Easely v. Crockford, supra.

[98] See ante, pp. 190. 192. 357 to 371.

(99) Lee v. Levi, 1 Barn. & Cres. 390. The endorsee of a bill sued the endorser and acceptor, and pending the actions, took a warrant of attorney from the acceptor without the endorser's knowledge for payment by instalments; and whether this was a bar to the action against the endorser was the question. On rule nisi to enter a verdict for the plaintiffs, and time to consider, the Court held it no bar on the general issue, which alone had been pleaded, and, therefore, the rule was made absolute.

CHAP. XIII.

Competence of Witnesses.
One of several Makers.
Maker.
Drawer.
Endorser.
Person who transfers Bill or Note without endorsing.
Acceptor.
Plaintiff, to prove loss of Bill or Note.

In an action against one of several makers of a note, another maker is a competent witness for the plaintiff; for, he is indifferent: if the plaintiff recover, he will be liable to pay contribution to the defendant; if plaintiff fail and force him to pay, he will be entitled to contribution from the defendant. (1)

[And in an action against the endorser of a note, the maker is a competent witness to prove its execution, for the plaintiff's prevailing in the suit does not relieve the maker, who will be liable to the defendant if the latter pays the note. (a)]

It was at one time held, that no person who had signed a negotiable bill or note was admissible as a witness to impeach its validity; because, his conduct had sanctioned what his testimony would defeat. (b)

But the contrary is now fully settled. (b)

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(1) York v. Blott, 5 Maule & S. 71. Assumpsit against one of two makers of a note; plaintiff called the other maker, and Grubbe II was [illegible] on motion for a new trial, the Court thought the witness stood indifferent, and was properly admitted, and they refused the rule.

[(a) Abat v. Rion, 9 Martin, 465.]

[(b) It was formerly held in England, as appears in the text, that a party to a negotiable instrument, could not be a witness to impeach its validity. Walton v. Shelly, 1 T. R. 296.

This rule, though abandoned in England, has been followed by many of the courts of the United States.

Thus it has been held that the endorser of a note was not a [illegible]

tent witness to prove that it was given for a usurious consideration. Parker v. Lovejoy, 3 Mass. R. 565; Winton v. Sadler, 3 Johns. Cas. 185; Churchill v. Suter, 4 Mass. R. 156.

In the case of Churchill v. Suter, Parsons C. J., after a review of the English cases which had been decided before that time, (1808), says,—"From the review of the adjudged cases, no conclusion, on either side, can be drawn."—"More than twenty years ago, after a full argument, the Court unanimously decided that the testimony of the parties to the note should not be admitted; and the decision has been uniformly adhered to. We admit, as a general rule, that infamy and interest are the tests of the competency of witnesses. But we are satisfied that the exclusion of parties to a negotiable security, from testifying that it was originally void, is another exception, established to resist commerce and discourage fraud. No man shall be admitted to allege his own turpitude, when the allegation will tend to encourage or support fraud or illegality."

So it has been held that the maker is not a competent witness in an action against an endorser, to prove that the note was given for a usurious consideration. Widgery v. Munroe, 6 Mass. R. 449.

So in an action against one of two makers of a joint and several note, the other, though released, is not a competent witness for the defendant, to prove that the note was given for a usurious consideration. Jones v. Coolidge, 7 Mass. R. 139; Houghton v. Page, 7 N. Hampshire R. 60.

So it has been held that the maker of a note who signed it for the accommodation of the endorser, is not a competent witness, in an action against the endorser, to prove that the defendant after receiving the note got it discounted at a usurious rate of interest; "because the note was made to all substantial purposes, when the endorser procured it to be discounted, which was the purpose for which it was made." Hartford Bank v. Barry, 17 Mass. R. 94.

It has been held in Massachusetts, that a person signing the note as agent for the maker, was not a competent witness to prove the note usurious in its creation. Packard v. Richardson, 17 Mass. R. 122.

The expressions reported to be used by the Supreme Court of Massachusetts in the case of Forbes v. Damon, imply that an endorser of a note could not be a witness to prove that the note was not given for any value, but was merely an accommodation note. The Court said, "The principle of the decision in Churchill v. Suter is applicable here. A party to a negotiable security shall not be received to show facts antecedent to the transfer, whereby the holder is to be defeated of his recovery." 15 Mass. R. 223.

But though a party to a note is not permitted to prove that it was void at its original formation, yet he is a competent witness to prove any subsequent facts, which invalidate the title of the holder.

In Powell v. Waters, 17 Johns. R. 180, the Court says, "A party whose name is on a negotiable paper, may be permitted to testify, as to any facts which arise subsequent to the signature of the witness."

Thus in an action against the maker of a note, the endorser is a competent witness, to prove that neither he nor the maker received any consideration for the note, that he delivered it to a third person in order to get it discounted at the bank, who, instead of offering it at the bank, put it into the hands of a broker. Woodhull v. Hunter, 10 Johns. R. 231; S. C. 8 Cowen, 689.

See also M'Fadden v. Maxwell, 17 Johns. R. 188; Skidding v. Warren, 15 Johns. R. 270; Holdsly v. Brown, post, p. 591.

So an endorser of a note, in a suit against the maker, is a competent witness to prove that it was given to the plaintiff to take up two other notes endorsed by the witness to the plaintiff, and on which two notes the plaintiff had received more than legal interest. Tuttle v. Davis, 20 Johns. R. 277.

So in an action by the administrators of the payee of a note against the administrator of the maker, a person who was a several promisee on the same security, was held to be a competent witness to prove that the note was given to the intestate for a usurious consideration. Fox v. Whitney, 10 Mass. R. 118.

So in an action against the endorser of a note, which the maker himself had passed to the plaintiff at a usurious interest, the defendant being an accommodation endorser, the maker was held to be a competent witness for the defendant, to prove the usury after being released by him. Van Schaack v. Stafford, 12 Pick. 565.

But in some cases, parties to negotiable instruments, though not interested, have been held not to be competent witnesses to prove an illegal consideration in the origin or transfer of a bill or note, where the plaintiff was himself a party to the illegal consideration. Mann v. Swann, 14 Johns. R. 276; Manning v. Wheatland, 10 Mass. R. 502. See also Houghton v. Page, 1 N. Hamp. R. 60; and Cumming v. Fisher, Anth. N. P. 1.

Mr. Justice McLean, who delivered the opinion of the Supreme Court of the United States, in the cases of the Bank of the United States v. Dunn, 6 Pet. S. C. R. 51, and Bank of the Metropolis v. Jones, 8 Pet. 12, appeared to consider parties to notes inadmissible to prove circumstances to which the plaintiffs were parties, which tended to invalidate the notes in their hands. But as in both these cases, the Court had abundant ground for their decision without supposing the witnesses incompetent, the question as to the admissibility of witnesses in similar cases, must be considered as an open one before that Court.

It has been held in Massachusetts, that in an action by an endorsee against the maker of a note, the endorser is not a competent witness, though he may have released to the defendant all his claims upon the note, to prove that it was pledged to the endorsee as collateral security for a debt less than the amount of it. Wilde J. in giving the opinion of the Court, says, "We think the witness rightly rejected. The endorsement being unqualified in terms is not to be qualified or restricted by the testimony of the endorser, establishing an interest in the note in himself or in his assignee. It would be a dangerous proposition to maintain, that the holder of a note endorsed absolutely or in blank, should be liable to have it thus impeached. If the note were pledged, and the endorser is entitled to a surplus, an action will lie in his name to recover it, but such a right cannot be established by his own testimony, accompanied with a release to the defendant, in order to affect the plaintiff's legal title to the note." Knights v. Putnam, 3 Pick. 184. Was not the evidence offered in this case immaterial? Ought it to have been received from any witness, any more than from the endorser? Had not the holder a clear right to recover the whole of the money from the maker, which the evidence offered did not tend to invalidate? After receiving the money he would, no doubt, be obliged to account to the endorser for any amount which he might receive beyond the sum for which it was pledged. If the evidence offered had been received from another witness, and the plaintiff held only entitled to recover of the maker the sum for which the note had been pledged, could the maker be liable to a second suit by the endorser for the surplus? Can the maker's promise be thus split in two?

Thus the drawer of a bill dated abroad and not presented is a competent witness to prove that it was made in England, and, therefore, not admissible in evidence. (1)

This rule excluding parties to negotiable instruments from being allowed to impeach them, only applies to the case of bona fide holders and mere parties to them in the usual course of business and for value, they are due.

Thus, in an action against partners as makers of a note, it was held that the payee, who endorsed it, was competent to prove that the note was given by one of the partners for his separate debt to the payee, and that he endorsed it to the plaintiff after maturity for the purpose of payment. Baird v. Cochran, 4 Serg. & Rawle, 397.

In Connecticut a bank has been decided, after much argument, to be, as to a negotiable instrument, a per interest in the event of the suit, a competent witness to prove that it was destitute of consideration. Tunno v. Reed, 1 Conn. R. 500.

The same decision has been made in Maryland. Chase v. Lloyd, 2 Har. & John. 54; Riggold v. Tyson, 2 Har. & John. 374.

In New York the tendency of the decisions for many years past has been to limit the rule adopted in Winton v. Sandler as much as possible; and the rule itself is now abandoned. In the case of Jackson v. Waters, 8 Cowen, 673, Woodworth J. having shown that the case did not come within the principle of Winton v. Sandler, proceeds, "But every question is presented that requires the expression of an opinion as to the doctrine in Winton v. Sandler, I am prepared to say it ought to be overruled; and I may add, that, upon full consideration, such was the unanimous opinion of our immediate predecessors of the Court."

But Spencer, Senator, in the same case, says of the rule in Winton v. Sandler, "It having been received and recognised as the law of the land for more than twenty years, I feel bound, according to my views here, to say that the Court had no authority to recede it."

In Stafford v. Rice, 5 Cowen, 23, and Bank of Utica v. Hillard, 5 Cowen, 143, both decided in October 1825, and Williams v. Weekes, 3 Wend. 115, decided in 1829, Winton v. Sandler is directly overruled, and it is expressly decided that a person whose name is on a note not intervened, may be a witness to prove that it was void in consideration for usury or other cause.

In Bank of Utica v. Hillard, Savage C. J. in giving the reasons for overruling Winton v. Sandler, says, "I cannot believe that justice can be promoted or the morals of the community improved, by preventing those guilty of frauds, to protect themselves from the testimony of the only witnesses who are supposed to have a knowledge of the facts. This court has been gradually receding from the decision in Winton v. Shelly; and I am free to declare, that I entirely deny the propriety of the exception adopted in that case; and consider the old case with its ancient exceptions the only correct one. That rule is, that every person, not interested in the event of the suit, not prejudiced by his religious tenets, nor by the conviction of an infamous crime, is a competent witness. All other circumstances affect his credit only."

(2) Jordaine v. Lashbrooke, 7 Term Rep. 601. In an action against the acceptor of a bill purporting to have been drawn at Hamburgh, the

And the only objection which can now be made against the testimony of a party to the bill or note is, that he has a direct interest in the event of the suit: if he have such an interest he is not admissible; otherwise, he is.

Therefore, in an action against one of several makers of a note, any of the others is a competent witness for the plaintiff; for, if the plaintiff succeed in the suit, the witness will be liable to pay contribution; if the plaintiff fail in the suit and make the witness pay, the witness will be entitled to receive contribution. (3)

So, in an action against the acceptor of a bill, the drawer is a competent witness either for the plaintiff (4) or for the de-

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defence was, that it was drawn in London, and, therefore, unstamped in evidence without a stamp; the payee and endorser was called to prove where it was drawn; but it was objected that he was incompetent. Lord Kenyon, however, admitted him; and on his testimony the defendant had a verdict upon the counts on the bill. On a rule nisi for a new trial, and cause shown, Ashhurst J. thought the witness inadmissible; but Lord Kenyon, Grose, and Lawrence Js., held that as he was neither interested in the event, nor rendered infamous by a conviction for any crime, he was properly admitted. Rule discharged. See also Adams v. Lingard, Peake, N. P. C. 117.

(3) *See* York v. Blott, *supra*, n. (L.)

(4) Dickinson v. Prentice, 4 Esp. N. P. C. 32. This was an action against the defendant as acceptor of a bill; the defence, intended to be set up, was, that the acceptance was a forgery: to prove the defendant's hand-writing the plaintiff called the drawer. It was objected, that having drawn the bill, the forgery of the acceptance could only be imputable to him; and that as he might be committed for a capital offence, if the forgery were established, he had such an interest as ought to disqualify him. But Lord Kenyon said, this was matter of observation as to his credit, but no objection to his admissibility. He was admitted, and the plaintiff had a verdict. See also Barber v. Gingell, 3 Esp. N. P. C. 62.

[Several merchants signed a written agreement to subscribe certain sums for a voyage, and authorized their agent to draw bills for the amount; and he drew a bill on one of the subscribers for the amount subscribed by him, for goods bought for the voyage, on the credit of the written agreement, which was shown to the payee; it was held that the drawer was a competent witness to prove the facts in a suit brought by the payee against the subscriber upon a constructive acceptance. Story J. said. "It is the common case of an agent called upon to prove his authority and agency; and that has always been deemed an excepted case. The witness has an equal interest either way. If he drew the bill without authority, and it is recovered from the defendant, then he is responsible over to the latter. If, on the other hand, no such recovery is had, he is liable to the plaintiff." Lowber v. Shaw, 5 Mason, 241.]

Action (5). (F.) So, if the plaintiff recover against the acceptor, the drawer pays the bill by the leave of the acceptor; if the plaintiff fail against the acceptor, the drawer is liable to pay the bill himself. (G)

And the drawer has accordingly been admitted for the plaintiff, to prove the defendant's hand-writing; and for the defendant, to prove that (5) the plaintiff discounted the bill upon an usurious consideration, or that (6) the bill had been paid.

And it is no objection to the competency of the drawer, when called to prove the acceptor's hand-writing, that he is expressly upon a charge of having forged it. (7)

But, in an action against the acceptor upon an acceptance for the accommodation of the drawer, the drawer is not, in general, a competent witness for the defendant; for he has a direct interest to defeat the suit; because, if plaintiff recover against the acceptor, the drawer will be liable to the acceptor not only for the amount of the bill, but for all the costs the acceptor may sustain. (H) whereas, if plaintiff fail against the acceptor, the drawer will be liable for the amount of the bill only, not for the costs. (8)

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(5) Rich v. Topping, Peake, N. P. C. 224. The drawer himself had endorsed the bill to the plaintiff for an usurious consideration; he had a release from the acceptor, which Lord Kenyon thought was necessary. The reporter, however, in a note upon the case, considers the witness stood indifferent, and ought to have been received even without a release; and in Bond v. Ackerman, 3 Esp. N. P. C. 119 the drawer (under precisely similar circumstances) was admitted without release; at least, it is not stated that he had any.

(6) Humphrey v. Moxon, Peake, N. P. C. 52. There was an action by an endorsee; and a distinction was attempted to be taken between this case, and one wherein the payee was the plaintiff: but Lord Kenyon held that there was no difference in principle, and admitted the drawer.

(7) See Dickinson v. Prentice, ante, p. 501, n. (4). In Barker v. Bucknell, 2 Esp. N. P. C. 62, the drawer was called to prove that he had paid the bill. Being at that time a prisoner on a charge of having forged the bill, and brought up by habeas corpus, he was objected to as incompetent; but Lord Kenyon overruled the objection.

(8) Jones v. Brooke, 4 Taunt. 464. Action against acceptor of a bill: the acceptance was without value, to accommodate the drawer; the drawer's wife was called as a witness for the defendant, to prove that the drawer endorsed away the bill upon an usurious consideration; the witness was objected to, but admitted; but on rule nisi, counsel cited and time to consider, the court held the drawer had a direct interest to defeat the action; because, otherwise, he must inhumanly descend

In such case, however, if the drawer have become bankrupt, and obtained his certificate, he will, since 6 G. 4. c. 16., be a competent witness for the defendant, upon giving a release to his assignees; for under s. 52. of that statute, the defendant would be entitled to avail himself of the commission; and would, therefore, be barred by the certificate. (9)

[It has been held that the drawer of a bill was not a competent witness for the plaintiff, in an action against the acceptor; "because if the plaintiff prevailed the witness would be liable to account to the defendant for the amount of the bill only; but if the defendant succeeded, the witness, as drawer, would be answerable to the plaintiff as holder, not only for the amount of the bill, but also for damages, charges, and interest. (*c*)

A prior endorser in an action against a subsequent endorser, is a good witness for the defendant. (*d*)]

In an action by endorsee of a note against an endorser, the maker is a competent witness for the plaintiff: for, if the endorser be made to pay, the maker will be liable to pay him; if the endorser be not made to pay, the maker will be liable to pay the endorsee; and his liability to the one cannot exceed in extent his liability to the other. (10)

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against the costs as well as pay him the amount of the bill; that the wife, therefore, was incompetent. Rule absolute.

(9) Ashton v. Longes, 1 Moody and Malkin, 127. In an action by endorsee of a bill against the acceptor, the defendant called the drawer to prove usury: the acceptance was lent for the accommodation of the drawer; but, he had become bankrupt, had obtained his certificate, and released his assignees: he was objected to as incompetent; but Lord Tenterden said, defendant, if he paid, might come in under the commission by 6 G. 4.; the drawer was, therefore, discharged, and competent. He was accordingly examined, but, notwithstanding his testimony, plaintiff had a verdict.

[(*c*) Scott v. M'Lellan, 2 Greenleaf, 199.]

[(*d*) Hall v. Hale, 8 Conn. 336.]

(10) Venning v. Shuttleworth, 24th February, 1796, at Guildhall. In an action by Venning, as endorsee of a note, against Shuttleworth as payee and endorser, the plaintiff called the drawer to prove notice to the defendant; he was objected to, but per Lord Kenyon "stat indifferenter," and he was accordingly admitted.

[In an action against the endorsee of a note, it was held that the maker was a competent witness to prove that time had been given him by a previous holder after the note became due. Spencer C. J. giving the opinion of the court, said, "The witness was answerable on the

[In an action against the guarantor of a note not negotiable, to which the defence was that the maker had been taken and discharged on execution for the same debt, and discharged out of custody, it was held in Connecticut, that the maker was an incompetent witness for the defendant, because if the defendant should defeat the action, the maker would be entirely exonerated, but if the plaintiff should compel the defendant to pay the money, the defendant would have a claim over against the maker. (*e*)]

In an action by endorsee against drawer or acceptor, an endorser is, in general, a competent witness either for plaintiff or defendant: for plaintiff, because, though the plaintiff's succeeding in the action *may* prevent him from calling for payment from the endorser, it is not certain that it will; and whatever

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note, whether the plaintiff succeeded in the suit or failed; and in either event no additional burthen was thrown on him. If this were an accommodation note, then on the authority of Jones v. Brooke, (4 Taunt. 466,) the objection to the witness would be well founded; because if the defendant was rendered liable in this action, he would have a remedy over against the maker of the note, not only for the principal and interest, but for the costs." Hubbly v. Brown, *16 Johns. R.* 70.

So in an action against the endorsee of a note signed in a partnership name, the person who signed the note is a competent witness for the defendant to prove, that the note was given for the witness's private debt, without the consent of his partner. Williams v. Walbridge, 3 Wend. 415. See also Boyd v. Brotherson, 10 Wend. 93.

But it has been held in Massachusetts, that in an action against the endorser of a note, the maker was not a competent witness for the defendant without a release. Jackson J. giving the opinion of the court, said, "The maker is directly interested in the event of the suit; because a verdict against defendant may be used as evidence in an action by the latter against him. If there has been any uncertainty in the practice of other courts, there has been none in this; and such witnesses have always been released by the defendant before they were examined by him." Pierce v. Butler, 14 Mass. R. 303.

Where the maker of a note had given a mortgage to the endorser, defeasible on the former's paying the contents of the note to the latter, it was held, in an action against the endorser by an endorsee, that the maker was not a competent witness for the defendant. By the court. "The object of the mortgage was to indemnify the endorser. Not only payment of the note by the maker would defeat the mortgage, but should the note be avoided by other means, so that the endorser should be saved harmless from it, the result would be the same. The witness was interested in the event of the suit." Cowles v. Wilcox, 4 Day, 108.]

[(*e*) Tenell v. Smith, 8 Conn. 426.]

part of the bill or note the endorser is compelled to pay, he may recover again from the drawer or acceptor: and he is competent for defendant; because, if plaintiff fail against drawer or acceptor, he is driven either to sue the endorser or to abandon his claim. (*f*)

Thus, he has been admitted, upon a bill drawn for his accommodation, to prove for the plaintiff that (11) the plaintiff gave him value for it; and he has been admitted for the de-

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[(*f*) In Massachusetts, in an action against the maker of a note, a release was in one case considered necessary in order to render an endorser a competent witness for the plaintiff, to prove the handwriting of the defendant. Barnes v. Ball, 1 Mass. R. 73.

So in New York, it was held that the endorser of a note was not a witness for the plaintiff in an action against the maker. Barkins v. Wilson, 6 Cowen, 471.

The endorser deposing that he had disposed of all his interest in the note, and had not made himself responsible, as he believed, was held not to render him competent. Barkins v. Wilson, 6 Cowen, 471.

So in Massachusetts, it was held that the endorser of a bill was not a competent witness in an action against a prior endorser, without a release. Talbot v. Clark, 8 Pick. 51.

In New York, it is held that an endorser who was not proved to have been charged by notice of the dishonor of a note, and who was not offered to prove the genuineness of the note, was a competent witness in an action against the maker, to show that the note was not usurious. Barrett v. Snowden, 5 Wend. 181.

So in an action against the drawer of a bill, an endorser who has endorsed it without recourse to himself, is a competent witness for the plaintiff to support his title as endorsee. Cowles v. Harts, 3 Conn. R. 516.

The endorser of a note was held to be competent witness for the plaintiff, in an action against the maker, to show that the defendant had notice of the transfer of the note to the plaintiff, before he acquired a claim against the endorser, which he had given in evidence as a set-off. Gibson J., in giving the opinion of the Court, said, that the witness was not interested; for if the plaintiff had succeeded he would have been liable to the defendant on the claim which was made the subject of the set-off; and if the defendant had succeeded, he would have been liable to the plaintiff on his endorsement: so that he stood entirely indifferent between them. Zeigler v. Gray, 12 S. & R. 42.

In Virginia, in an action by an endorser against the drawer of a bill, it was held, that an endorser, who purchased the bill merely as agent of the plaintiff, was not a competent witness for the plaintiff, unless the agency was first proved by other evidence than the endorser's, or the endorser released; but that after the agency was proved, or the release given, he would be competent. Murray v. Carrett, 3 Call, 373.

See also Steinmitz v. Currie, 1 Dall. 269.

An endorser of a note who has not been charged by notice, is a witness for the maker to prove that the note has been paid. Bourg v. Bringier, 20 Martin, 507.]

(11) Shuttleworth v. Stephens, 1 Campb. 408.

fendant, to prove that he had paid the bill (12), or to prove that an unstamped bill, dated abroad, had, in fact, been made here. (13)

So, he has been admitted for the plaintiff to prove his own endorsement. (14)

And, where the endorsement has been negatived by another witness (not being an attesting witness) whom plaintiff had called, he, or some person who saw it written, is the only witness who can be called to prove it. (15)

But an endorser is not a competent witness for defendant, to prove that he endorsed it to plaintiff only to enable him to receive the money for such endorser: for, if plaintiff recover, it will prevent the witness from doing so; whereas, if plaintiff were defeated, he might. (16)

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(12) Charington v. Milner, Peake, N. P. C. 6. The note had been endorsed by Monk to the plaintiff, and the defendant was allowed by Lord Kenyon to call Monk, to prove that he had paid the note to the plaintiff.

Birt v. Kershaw, 2 East's Rep. 458. The defendant drew a bill in favor of Wilby, which Wilby endorsed to Glover, whose assignees now sued the defendant on the bill. The defendant called Wilby, to prove that he had paid the bill to Glover, and had been reimbursed by the defendant. It was objected that Wilby (who had no release from Kershaw) came to discharge himself, and was, therefore, interested; his evidence, however, was received, and a verdict found for the defendant. And on rule nisi to set it aside, and cause shown, the Court was clearly of opinion that this testimony had been properly admitted; that this case fell directly within the principle of that of Ilderton v. Atkinson, 7 Term Rep. 480; that the witness stood indifferent. Rule discharged. Lord Ellenborough said, "It is true that in an action by the defendant against Wilby for the money received by him, if the plaintiffs recover, Wilby may also be liable for the costs of this action; but that argument was urged in Ilderton v. Atkinson, without effect."

(13) See Jordaine v. Lashbrook, antè, p. 590. n. (2).

(14) Richardson v. Allen, 2 Stark. 334. In an action by endorsee against acceptor, a witness, called to prove the endorsement, said it was not the supposed endorser's writing; plaintiff then proposed to call other witnesses to prove it was, but Lord Ellenborough *held*, that as plaintiff was not obliged to have called the witness he did, from his being an attesting witness, it was not competent for him to call other witnesses to contradict him. Plaintiff then proposed to call the endorser himself, and Lord Ellenborough thought he might; because he could speak from knowledge, other witnesses from belief only, and he came to charge himself: he was examined accordingly, but negatived the handwriting; and plaintiff was nonsuited.

(15) See Richardson v. Allen, suprà.

(16) Buckland v. Tankard, 5 Term Rep. 578. Action by an endor-

[It has been held, that, in an action against the maker of a note, a person who passed it to the plaintiff without endorsing it, was not a competent witness to prove the signature of the maker, because he was liable on an implied warranty that the note was not forged. (*g*)

But a person who sells a note, without endorsing it himself, is a competent witness for the plaintiff in an action by the holder against an endorser, after the execution of the note is proved. (*h*)

So he is a good witness, if, after the sale of the bill or note, he obtains a discharge under an insolvent law, before he is called on as a witness; any right of action against him upon

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see against the acceptor of a bill. The bill was drawn by Gregson, payable to his own order, and endorsed by him in blank; and the defendant called Gregson to prove that he had endorsed and delivered it to the plaintiff, that he might get it paid, and not to give him any interest in it; and that he had no consideration for it, and was still entitled to it. The witness had a release from the acceptor. Lord Kenyon thought him interested, and rejected him. And on a rule nisi for a new trial, the Court held, that his situation would be better or worse according to the event of the verdict, and therefore that he was properly rejected. Rule discharged.

[In a case before Washington J. he refused to admit the second endorser of a bill as a witness, in a suit brought by his endorsee against the first endorser, in order to prove that he, and not the plaintiff, was the real owner of the bill, saying, "the witness cannot be permitted to swear himself into an interest." Cropper v. Nelson, 3 Wash. C. C. R. 125.]

[(*g*) Herrick v. Whitney, 15 Johns. R. 240. Per Curiam. "The witness was responsible upon an implied warranty that the note was not forged. He therefore had a direct interest in establishing the fact which he was called to prove; for by obtaining a verdict for the plaintiff on the plea of *non assumpsit*, he protected himself against his own warranty."

A witness in a similar case was held to be incompetent, who had passed the note to the plaintiff to be collected at the plaintiff's risk. For this means the risk of the maker's solvency, not the risk of the note's being a forgery. Shaver v. Ehle, 16 Johns. R. 201.

But in a case in Massachusetts, an endorser who had endorsed a note to A. B. "at his own risk," was held to be a competent witness to prove the execution of the note. The defendant's counsel objected that the witness was interested in the event of the suit, on account of his liability in case the note was forged. But the Court said that he had no interest in the event of the suit. The Court however says nothing as to his liability, in case the maker's name was a forgery. Rice v. Stearns, 3 Mass. R. 226.]

[(*h*) Williams v. Matthews, 3 Cowen, 252; Barkins v. Wilson, 6 Cowen, 471; Murray v. Judah, 6 Cowen, 494.]

his implied warranty of the genuineness of the signatures, commencing when the note is sold. (*i*)]

In an action against the drawer of a bill, the acceptor is not a competent witness for defendant, to prove that the plaintiff obtained the bill from the acceptor upon a promise to get it discounted, and that the plaintiff had never done so: for, the acceptor would be liable to indemnify defendant against the costs as well as against the amount of the bill, and would, therefore, have a direct interest against the plaintiff to the extent of such costs. (17)

And the rule that he ought to be admitted as a witness *of necessity* does not apply. (17)

In an action against the drawer of a bill, it has been held that the acceptor is not a competent witness for defendant, to prove a set-off, on the ground that he is answerable to the drawer only to the amount to which plaintiff recovers against defendant. (18)

[(*i*) Murray v. Judah, 6 Cowen, 484.]

(17) Edmonds v. Lowe, 8 Barn. & Cres. 406. In an action by endorser of a bill against the drawer, defendant offered to call the acceptor, to prove that defendant put the bill into his hands to get it discounted, that the acceptor put it into plaintiff's hands, to whom he owed 70*l*., that the plaintiff was to get it discounted, and retain his 70*l*.; but plaintiff never had got it discounted; and that the consideration upon which it had been handed to him had, therefore, wholly failed. Lord Tenterden thought him incompetent, and rejected him, and on rule nisi for new trial, and cause shown, the Court thought him rightly rejected: he was liable upon the bill, and there was an implied undertaking that he would indemnify defendant; and under that undertaking he would be liable, not merely for the amount of the bill, but for the costs; and by defeating plaintiff's claim, he would free himself from payment of those costs. It was pressed that he was a witness of necessity, but the Court said, that exception applied only to agents employed in the ordinary transactions of commerce. Rule discharged.

(18) Mainwarring v. Mytton, 1 Stark. 83. In an action against the drawer of two bills, he called the acceptor to prove that the acceptor had endorsed to defendant a bill drawn by him on the plaintiff, and accepted by plaintiff, and that defendant was, therefore, entitled to set off this acceptance. Objection being made to his competence, it was urged that he was indifferent, for if plaintiff failed against the drawer, he might sue the witness; but Dampier J. said, the witness was interested in lessening the balance, being answerable to defendant for what plaintiff should recover; and he was rejected, and plaintiff recovered his whole demand.

[In an action against the drawer of a bill, it has been held that the acceptor, though he had funds of the drawer's in his hands sufficient to pay the bill, at the time he accepted it, was a competent witness for

But if the drawer be protected against the holder by a cross demand he has against the holder, quære, whether such cross demand, when set off, is not equivalent to payment? and will not the drawer be entitled to call upon the acceptor for the full amount of the bill, as much as if he had paid the full amount in money?

[Where two persons being sued as acceptors of a note, and one of them having pleaded bankruptcy, the plaintiff enters a *nolle prosequi* as to him, the bankrupt having released his interest in the surplus of his effects, is a good witness for his co-acceptor. (*k*)

It is held, that in an action on a bill or note, a person interested in the event of the suit, or even the plaintiff himself, was competent to prove the loss of the instrument. (*l*)]

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the defendant, because not liable for the costs of the suit. Barnwell v. Mitchell, 3 Conn. R. 101.]

[(*k*) Aflalo v. Fourdrinier, 3 M. & P. 743; S. C. 6 Bing. 306.]

[(*l*) In an action on a note not negotiable, brought in the name of the payee for the benefit of an assignee, it was held that the party in interest might be a witness to prove the preliminary point of the loss of the note, in order to let in parol evidence of its contents. Chamberlain v. Gorham, 20 Johns. R. 144.

So it has been held that the plaintiff was a competent witness to prove the loss of a bill of exchange. Mecker v. Jackson, 3 Yeates, 442.

Parties to suits have, in some American cases, been admitted to prove the loss or destruction of deeds, preparatory to the admission of evidence of their contents. See Jackson v. Frier, 16 Johns. R. 193; Seekright v. Bogan, 1 Hayer. 176.]

CHAP. XIV.

Forgery of Bills or Notes.

Altering.
Adding.
Assuming the Character of a Person of the same Name.
Assuming a false Name.
Using a fictitious Name.
Procuring another to forge.
——————— *or utter.*
Uttering.
Disposing of.
Instrument.
——————— *without Stamp.*
Intent.
Indictment.
Evidence.
Witnesses.

Forging, or causing to be forged, or assisting in forging, any bill or note, or any endorsement or assignment thereof, with intention to defraud any person whatever; or uttering the same as true, knowing it to be forged, with a like intent, was made a capital offence by 2 Geo. 2. c. 25. (1)

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(1) By 2 Geo. 2. c. 25. s. 1., (made perpetual by 9 Geo. 2. c. 18.,) "if any person after 29th June, 1729, shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false making, forging, or counterfeiting, (amongst other things,) any bill of exchange or promissory note for payment of money, or any endorsement or assignment of any bill of exchange or promissory note for payment of money, with intention to defraud any person whatsoever; or shall utter or publish as true any false, forged, or counterfeit bill of exchange or promissory note for payment of money, or any endorsement or assignment of any bill of exchange or promissory note for payment of money, with intention to

This act did not extend to Scotland. (2)

By 7 Geo. 2. c. 22., it is applied to acceptances, and the term *alter* is used as well as *forge*. (3)

By 31 Geo. 2. c. 22. s. 78., (4) the second of Geo. 2. is extended to cases where the intent is to defraud, not an individual, but a corporation; and by 18 Geo. 3. c. 18., (5) the seventh of Geo. 2. c. 22. is in like manner extended.

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defraud any person, knowing the same to be false, forged, or counterfeited; then every such person shall be deemed guilty of felony, without benefit of clergy."

(2) By s. 4. of the same statute it is provided, that nothing in that act contained shall extend to that part of Great Britain called Scotland.

(3) By 7 Geo. 2. c. 22., which recites that by 2 Geo. 2. c. 25., no punishment is inflicted upon any person who shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting, any acceptance of any bill of exchange, or who shall knowingly utter or publish the same as true: it is therefore enacted, "that if any person, after the 24th day of June, 1734, shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting any acceptance of any bill of exchange with intention to defraud any person whatsoever; or shall utter or publish as true any false, altered, forged, or counterfeited acceptance of any bill of exchange, with intention to defraud any person, knowing the same to be false, altered, forged, or counterfeited; then every such person shall be deemed guilty of felony, without benefit of clergy."

(4) By 31 Geo. 2. c. 22. s. 78., which recites that doubts might arise whether the punishment inflicted by 2 Geo. 2. c. 25. extends to the commission of forgeries with intention to defraud any corporation, it is enacted, "that if any person from and after the 1st of July, 1758, shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false making, forging, or counterfeiting, any bill of exchange or promissory note for payment of money, or the endorsement or assignment of any bill of exchange or promissory note for payment of money, with an intention to defraud any corporation whatsoever; or shall utter or publish as true, any false, forged, or counterfeited bill of exchange or promissory note for payment of money, or the endorsement or assignment of any bill of exchange or promissory note for payment of money, with intention to defraud any corporation, knowing the same to be falsely forged or counterfeited: then every such person shall be deemed guilty of felony, without benefit of clergy."

(5) By 18 Geo. 3. c. 18., which recites that doubts had arisen whether the punishment inflicted by 7 Geo. 2. c. 22. extended to such forgeries when committed with an intention to defraud any corporation, it is enacted, "that if any person after the 25th of March, 1778, shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly act or assist in the

And by 45 Geo. 3. c. 89., (6) forging or altering or causing to be forged or altered, or willingly acting or assisting in the forging or altering, any bill or note, or any endorsement or assignment or acceptance thereof, with intent to defraud any person or body politic; or offering, disposing of, or putting away, any such forged or altered bill, note, endorsement, assignment, or acceptance, with a like intent, knowing it to be forged or altered; is a capital offence: and this act extends to every part of Great Britain. (7)

By 43 Geo. 3. c. 139. s. 1., forging or uttering any bill or note purporting to be the bill or note of any foreign prince, state, or country, or of any person or company of persons residing in any foreign country, or of any body corporate, or

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false making, altering, forging, or counterfeiting, any acceptance of any bill of exchange, with intention to defraud any corporation whatsoever; or shall utter or publish as true any false, altered, forged, or counterfeited acceptance of any bill of exchange, with intention to defraud any corporation whatsoever, knowing the same to be false, altered, forged, or counterfeited; every such person, being thereof lawfully convicted, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy."

(6) By 45 Geo. 3. c. 89. s. 1., which recites 2 Geo. 2. c. 25. and certain other acts, and states that certain provisions had been made and enacted for the preventing and punishing the forgery of bank notes, and other notes, bills, and instruments, in those acts respectively mentioned; and that it was expedient that such provisions should extend and be in force in every part of Great Britain, with such alterations and amendments therein as were thereby made; it is enacted, "that if any person or persons shall, from and after the passing of this act, falsely make, forge, counterfeit, or alter, or cause or procure to be falsely made, forged, counterfeited, or altered, or willingly act or assist in the false making, forging, counterfeiting, or altering (among other instruments) any bill of exchange, promissory note for payment of money, endorsement or assignment of any bill of exchange or promissory note for payment of money; or acceptance of any bill of exchange with intention to defraud any person or persons, body or bodies politic or corporate whatsoever; or shall offer, dispose of, or put away any false, forged, counterfeited, or altered bill of exchange, promissory note for payment of money, endorsement or assignment of any bill of exchange or promissory note for payment of money, or acceptance of any bill of exchange, with intention to defraud any person or persons, body or bodies politic or corporate, knowing the same to be false, forged, counterfeited, or altered, then every person or persons so offending shall be deemed guilty of felony, without benefit of clergy."

(7) By 45 Geo. 3. c. 89. s. 8., "all and every the clauses and provisions in this act contained, shall extend to every part of Great Britain."

body in the nature thereof, constituted by any foreign prince or state, with intent to deceive his Majesty, or any such foreign prince, &c. or any person or body politic here or abroad, is made a felony, and punishable by transportation for a term not exceeding fourteen years. (*a*)

There are other provisions as to bank notes, bank post bills, and certain other securities, as to which the different statutes which refer to them must be consulted.

Forgery may be committed either by altering or adding to what has a genuine signature, or by introducing a false signature.

And a signature will be false, though in a man's own name, if he attach to it or adopt the description or addition of any other person of the same name. (8)

And a signature in a false name assumed for the purpose, or in the name of a non-existing person, will be as much a forgery as a signature in the name of an existing person. (9)

Misapplying a genuine signature, by writing over it a bill or note for which it never was intended, so as to give it the appearance of the signature to such bill or note, is a forgery. (10)

[(*a*) Under the statute of Virginia, the false uttering of a forged note of a bank in another State or District, is a false uttering of a promissory note for the payment of money, and as such indictable." Commonwealth v. Hensley, 2 Virg. Cases, 149.]

(8) Rex v. Webb, post, p. 605.

(9) Rex v. Francis, Mich. 1811. John Francis took a lodging in the name of Cook; and in less than a month passed to his landlord's wife a draft he drew on Praeds and Co. for 15*l*., and she gave him a bank note for it to that amount. It was returned, on the ground that no person of that name kept cash there: the prisoner said it was a mistake for want of his adding "jun." to his name; which he accordingly added, and the note was again taken to Praeds, who again refused payment; but before it was brought back the prisoner absconded. Chambre J. left it to the jury whether he did not assume the name of Cooke, or at least of Cooke, *jun.*, with intent to defraud his landlord; and the jury thought he did, and he was convicted. On case, the conviction was held right.

(10) Rex v. Hales, 17 St. Tr. 161. Hales got a genuine signature of Thomas Gibson, and wrote over it a promissory note for 6400*l*. He was indicted for forging the note, and for uttering it knowing it to be forged; and upon a trial before Page J. and Carter B., the objection was taken, that as the signature was genuine it could not be called a forged note; but the objection was over-ruled, and defendant was convicted.

And so is misapplying a genuine signature so as to give it the appearance of an acceptance or endorsement. (11)

Altering a bill or note from a lower to a higher sum, is a forgery; the instrument, as altered, is a false instrument. (12)

Discharging one endorsement and inserting another, is altering the endorsement; (13) (14)

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(11) Rex v. Hales, 17 St. Tr. 209. The same defendant was afterwards tried before Pengelly C. B., Reynolds J., and Sir William Thompson, for forgery upon a piece of paper containing a genuine signature of Samuel Edwards, by writing on the other side of the paper a note for 600*l.* payable to Samuel Edwards or order, and writing over the signature of Samuel Edwards "Pray pay the value of this to for value received," so as to make the genuine signature of Samuel Edwards appear to be the endorsement of this note. The indictment was for forging the endorsement, and the Court treated it as clear that this was to be deemed a forged endorsement.

The same point occurred in the Rex v. Hales, 17 St. Tr. 229. as to a note for 12*l.*

These offences were prior to 2 Geo. 2. when the forging and uttering was a misdemeanor only, and it was probably on account of these forgeries that that statute was made.

The genuine signature in each of these cases was intended for a frank, and at that time the signature alone was sufficient for the frank.

(12) Rex v. Teague, Mich. 1802. Prisoner altered a 10*l.* country bank bill to 50*l.*; it was on a sixteen-penny stamp, and had been thrice paid and reissued. The indictment charged, first, that the prisoner forged the bill; and, secondly, that he uttered it knowing it to be forged: two objections; first, that the charge should have been for altering; and, secondly, that this being a bill, not a note, could not legally be reissued without a new stamp. Prisoner was convicted, and the judges held the conviction right.

Rex v. Elsworth, Pasch. 1781. An indictment stated that a bill was drawn for 8*l.*; that persons unknown feloniously did alter it, by falsely forging and adding a cipher to the 8*l.* and a *y* to the eight; that the prisoner had in his possession the said false, forged, altered, and counterfeited bill, and that he feloniously did utter as a true bill, the said false, forged, altered, and counterfeited bill, with intent, &c., and knowing, &c. Motion in arrest of judgment, on the ground that the forgery was stated to be by persons unknown, and that the statement should have been that they feloniously *forged*, not that they feloniously *altered*; the statute 2 Geo. 2. c. 25. s. 1., making it capital to *forge*, but saying nothing as to altering; but it was answered that the *altering* was *forging*, and the judges were unanimous that the conviction was right.

And see Rex v. Post, antè, p. 12.

(13) Rex v. Birkitt, July, 1813. After conviction generally upon a bank indictment, it appeared there was one count only upon which the conviction could be supported; that count stated that the prisoner had in his possession a bank bill of exchange with a falsely altered endorsement thereon, and that he disposed thereof. The genuine endorsement was by Grant, Burbey and Co., to Ladbroke and Co.; the prisoner discharged the whole of that endorsement, and wrote de novo,

And forging it.

And discharging an endorsement by chemical means is raising it. (14)

And what is written on the face of the bill may be deemed an endorsement. (14)

If a bill or note import to be payable at any of several places, substituting a new place for one of those named, if with intent to defraud, is a forgery. (15)

Substituting the new place, by introducing over the old one a piece of paper containing the new one, is a forgery. (15)

If there be two persons of the same name, but of different descriptions or additions, and one sign his name with the description or addition of the other, it is a forgery. (16)

Thus, if a bill be addressed to A. B. of London, merchant, and A. B., not of London, or not a merchant, accept it, the acceptance will be a forgery, if there be any A. B. of London, merchant (16);

"Grant, Burbey and Co.;" the judges thought this alteration made the bill what the indictment described it, and that on this count the conviction was right.

(14) Rex v. Bigg, 3 P. Wm. 419. By 8 & 9 W. 3. c. 20. s. 36., altering or raising any endorsement on any bank bill or note of any sort, is made felony, without clergy. Upon a bank note for 100*l.* the bank paid 90*l.* and wrote upon the face of the note in red ink, "paid ninety pounds;" this writing the prisoner discharged by some liquid, probably lemon-juice: indictment thereon. The indictment stated that *quoddam scriptum, anglicè* an endorsement, on the said note, was duly made, specifying that 90*l.* was paid, and that the prisoner feloniously erased that endorsement; special verdict, finding (inter. al.) that at the time of the act and till the 28th Nov. 1696, the only way used for endorsing bank notes, was, by writing in black ink on the back side of the notes, but from the 28th Nov. 1696, it was by writing in front in red ink; special verdict. Many objections were taken; one, that this was not an endorsement: after argument, the judges differed, but the majority held the conviction right. The prisoner was transported, not executed.

(15) See Rex v. Treble, antè, p. 95.

(16) Rex v. Webb, Mich. 1819. A bill was addressed to Thomas Bowden, baize manufacturer, Rumford, and prisoner uttered it with an acceptance thereon made by a Thomas Bowden, who did not live at Rumford, and was not a baize manufacturer; and on indictment for uttering a forged acceptance, it appeared that there was no such baize manufacturer at Rumford: on case, the majority of the judges held that the adopting a false description and addition, where a false name was not assumed, and where there was no person answering that description or addition, was not a forgery; and the prisoner was pardoned.

Or for a system of fraud within which that signature fell. (20)

And it makes no difference, though the bill or note would have been equally taken had the party used his own name. (21)

And though it were taken upon the credit of other names upon the bill or note, not upon the fictitious name. (22)

And though the party had passed for some time by that name. (23)

But a signature in an assumed name will not be a forgery, though the name were assumed for concealment or fraud, if it were not assumed with a view to that transaction, or for a system of which that is part.

Signing a mark in an assumed name, and suffering the assumed name to be ascribed to the mark, is forging the name. (24)

And it makes no difference, though the assumed name be not ascribed to the mark till after the mark is made, if it be ascribed to it in the prisoner's presence. (24)

Procuring a man to forge a bill or note is a capital offence. (25):

Procuring to utter, a common law felony only. (25)

But procuring to utter, if the person procured were ignorant

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judges held his conviction right; and that if he had used the name of White before he went to Nuneham, it was incumbent on him to prove it. And see Rex v. Francis, antè, p. 603. n. (9).

(20) See Rex v. Whiley, p. 607., and Rex v. Peacock, suprà.

(21) See Rex v. Marshall, Rex v. Whiley, antè, p. 607., and Rex v. Francis, 603.

Rex v. Shepherd, Michaelmas, 1781. The prisoner bought some things at a silversmith's, and uttered a forged check in payment: the silversmith took it as *his* draft, and he knew it. On conviction a doubt was entertained, because as the silversmith gave credit to the prisoner, not to the draft, for he supposed it to be the prisoner's check; but on point saved, the judges were unanimous the conviction was right.

(22) See Rex v. Hough, post, p. 612.

(23) See Rex v. Wiley, antè, p. 607. Rex v. Francis, antè, p. 603.

(24) See Rex v. Dunn, antè, p. 607.

(25) Rex v. Morris, Pasch. 1814. The prisoner was convicted of procuring his wife to utter a forged order for payment of money, and the judges held he could only be punished as for a common law felony; but they held, that had he been found guilty of procuring her to forge it, the offence would have been capital.

of the forgery, and therefore free from crime, may make the procurer chargeable for the uttering, and subject him to an indictment capitally on that charge.

Showing a man forged notes to raise a false idea in him of the party's substance, would probably not be an uttering within 2 Geo. 2.; it has been held not to be an uttering of the sham notes to which 13 Geo. 3. c. 79. applies. (26)

Nor would the leaving them with him sealed up, under color that he may take charge of them as being too valuable to be carried about. (26)

To constitute an uttering it probably would not be deemed necessary it should be uttered in payment.

Uttering under the false pretence that it had been given in change by the person to whom it is uttered, in order to obtain from him a good note in lieu thereof, would probably be deemed an uttering; it has been so held in the case of counterfeit coin. (27)

And under 45 Geo. 3. c. 89., offering, disposing of, or putting away, is described as the offence; uttering is not mentioned.

The offence of disposing of and putting away may be com-

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(26) Rex v. Shuckard, Michaelmas, 1811. Prisoner had two sham notes for paying 550*l.*, but the numbers were in white letters on a black ground, so that they had the appearance of bank notes for 550*l.*; he showed them to J. S. with intent to make him suppose he was a man of fortune, but they were folded up so that the numbers only were visible: he then said he did not like to carry so much property about him, sealed them up in a cover, and delivered them to J. S. that he might take charge of them for the prisoner; the prisoner was afterwards suspected; J. S. opened the cover, discovered what the notes were, and the prisoner was indicted on the 13 Geo. 3. c. 79. for uttering and publishing them; but on case, the judges held, that what he had done did not amount to an uttering or publishing within the statute, and that the conviction was wrong.

(27) Rex v. Franks, Leach, 736. The prisoner sold Redit some apricots, and Redit paid him a good shilling; the prisoner put it into his mouth, and took from thence a counterfeit, and gave it to Redit as the shilling received from him, desiring him to change it; which he did. The prisoner practised the same trick with a second and third good shilling Redit gave him; on which Redit apprehended him. Conviction.—Objection that the indictment did not state that the shilling was uttered as and for a good one; the Court thought an uttering not in payment within the statute, and the indictment right.

plete, though the person to whom they were disposed of were an agent to detect utterers. (28)

And though the prisoner were applied to by such agent for the bill or notes. (28)

And though he might not have had them when the agent first applied. (28)

And though he disposed of them, not as genuine, but as forged. (28)

Giving a confederate a forged bank note that he may utter it, is a disposing and putting away thereof. (29)

Forging or uttering a bill or note for less than 20*s*., or a bill or note for (30) less than 5*l*. which does not comply with the requisites of 17 Geo. 3. c. 30., or any other bill or note the legislature has declared void, is not within the statutes against forgery.

But a bill or note for payment of so many pound, instead of pounds, is. (31)

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(28) Rex v. Holden, Michaelmas, 1809. Indictment charged that prisoner disposed of and put away a forged bank note with *intent* to defraud the bank, he knowing it at the time to be forged. The evidence was, that Shaw and Whitehead were employed by the magistrates, with the approbation of the agents for the bank, to detect utterers: that they applied to the prisoner, who procured the notes, and sold them, not as genuine, but as forged: it did not appear by any direct evidence that prisoner had the notes in his possession when first applied to, but he produced them at a subsequent meeting. It was urged, 1st, That the indictment was insufficient, as not stating in what manner and to whom the notes were disposed of; and, 2ndly, that the disposal was insufficient, as the prisoner was solicited to commit the act by the Bank's agent: but Chambre J. overruled the objections, and, on case for the twelve judges, they were unanimous that the objections had no weight.

(29) Rex v. Palmer, Pasch. 1804. Palmer and Hudson were jointly indicted, 1st, for uttering a forged bank note; and, 2ndly, for disposing and putting away: Hudson tendered it in payment, but Palmer was not with her: the shopkeeper stopped it as suspicious, and Palmer came afterwards with Hudson, and claimed it as his, and said he would have either the note or change. The jury found Palmer alone guilty; and seven judges against four, held him well convicted on the second count.

(30) Rex v. Moffat, Hil. 1787. Indictment for uttering a forged acceptance on a bill for 3*l*. 3*s*. The bill did not specify the payee's place of abode, and had no subscribing witness, and was therefore void by 17 Geo. 3.; and, on a case reserved, the judges held this not a forgery within 7 Geo. 2.

(31) See Rex v. Post, antè, p. 12.

And so is a bill or note for payment of ten, twenty, thirty, &c. omitting "Pounds," if the figures with an £. affixed be put upon it to denote the amount. (32)

And so is a bill on the commissioners of the navy, though it be not warranted by 35 Geo. 3. c. 94., if it have the requisites of a bill of exchange. (33)

But a bill or note is not within the statutes against forgery, unless it be for payment of money in specie (34);

And at all events.

Therefore, a bill or note to pay in cash *or* bank notes is not within those statutes. (34)

A note to take the same as a given sum in part payment for a money note of higher amount, is not such a note the forgery of which will be even a common law misdemeanor, unless it express a consideration upon the face of it. (35)

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(32) Rex v. Eliot, Michaelmas, 1777. The prisoner was found guilty of forging this note, "$\frac{\text{No.}}{17.37}$ I promise to pay to Mr. Jos. Crook, or bearer, on demand, the sum of fifty, London, the 20th day of June. For the governor and company of the Bank of England. Thos. Thompson. £Fifty. Entered, C. Blewerse." One count called it a note for payment of money only, describing it, however, as for payment of fifty pounds, and setting out the tenor: on the trial, the judge left it to the jury whether it was not to be considered as for 50*l.* The prisoner was found guilty, and, on case, the judges were unanimous of opinion the conviction was right.

(33) Rex v. Chisholme, Pasch. 1815. Prisoner was convicted of uttering a bill on the commissioners of the navy for 22*l.* 6*s.* 9*d.*, for pay due to J. S. as acting lieutenant of the Zealous. Acting lieutenants have no power under 35 Geo. 3. to draw, and it was admitted, therefore, that the indictment could not be maintained on 35 Geo. 3.; it was urged, that it could not be deemed a bill of exchange, because the commissioners of the navy were removable, and the instrument, if genuine, would not have been drawn for the purpose of being accepted by the commissioners, but in order to obtain an assignment under 35 Geo. 3.; but the judges, on case, held, that it was, in form, a bill of exchange, and 35 Geo. 3. would not prevent its being so.

(34) See Rex v. Wilcox, antè, p. 10.

(35) Rex v. Burke, Michaelmas, 1822. The prisoner was convicted as of a misdemeanor, in disposing of and putting away the following forged promissory note, knowing it to be forged: "Blackburn Bank. I promise to take this as 1*l.* 10*s.* on demand in part for a 2*l.* note, value received. Blackburn, April 18, 1821. For Cunliffe, Brooks and Co., R. Cunliffe." It was insisted that this could not be deemed a promissory note, and that it had no legal validity; and on case, the judges were clearly of that opinion. It was not a note to pay money, but a promise to take that note in payment; and as the consideration was

And it is questionable whether a bill or note payable to , or order, leaving a blank for the payee's name, is within the statutes. (36)

Forging or uttering a note without a maker's name, is not a capital offence. (36*)

Forging or uttering a bill or note, importing to be payable to A. B. or order, is a complete offence, though there be no endorsement upon it in A. B.'s name. (37)

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not expressed, it was *nudum pactum*; and the judges recommended that judgment should be arrested.

(36) See Rex v. Randall, antè, p. 31.

(36*) Rex v. Pateman, Pasch. 1821. Prisoner was convicted of uttering and publishing as true a forged promissory note. The note was as follows: "No. 16,209. Bedford Bank. I promise to pay the bearer forty pounds on demand, here, or at Sir Charles Price, Baronet, and Co.'s, bankers, London. Value received. Bedford, the 17th day of October, 1817. For Barnard Barnard and Green." It was objected that this was no note, because it had no maker's name, and imported to bind nobody: the point was saved for the consideration of the judges, and they held the objection good, and the conviction wrong.

(37) Rex v. Birkett, Pasch. 1805. Indictment for forging and uttering a note payable to the prisoner's order: it appeared that he deposited it for his bill at an inn, unendorsed, with a promise that he would pay the bill in a few days, saying, he wished not to discount it. Conviction.—Doubts, whether it should not have been left to the jury to consider, whether he did not really mean to pay his bill, and get back the note, and make no further use of it. The judges thought not, and the conviction stood.

Rex v. Hough, Michaelmas, 1806. Indictment for uttering a forged bill importing to be drawn by Hastings, payable to Higgins, or order, with intent to defraud Green: the indictment did not state any endorsement in Higgins' name: the prisoner passed it to Green, and Green, at the time, inquired who Hastings and Higgins were, and the prisoner said he did not know much about Hastings, but he spoke of Higgins as a considerable manufacturer, and Green took the bill on the prisoner's representation of Higgins. Sutton B. doubted whether prisoner could properly be convicted, as Green took the bill on the credit of Higgins, and there was nothing in the indictment about his endorsement; but all the other judges thought the conviction right.

Rex v. Wicks, Pasch. 1809. Prisoner uttered a forged bill importing to be payable to the order of the drawers, Rimmington and Co.; it had not their endorsement thereon, though it had one endorsement beside prisoner's. On conviction thereon a case was reserved, and on consideration, the judges (nine) held the conviction right; for the instrument was a bill, and though it would not be available against the drawers without their endorsement, they might be compelled to endorse it, if they passed it away for good consideration. Lawrence J. for some time doubted, but at last seemed satisfied.

Forging on unstamped paper a bill or note which requires a stamp, is as much an offence as if it were on stamped paper. (38)

And altering a bill which has once been paid, and which has been reissued without having a new stamp thereon, where such new stamp is requisite, is as much an offence as if the bill had never been paid, or as if it had had the additional stamp. (39)

An intent to defraud the person who would have to pay the bill or note, if it were genuine, is to be inferred. (40)

And this inference ought to be drawn, though, from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him. (40)

And though, from its being negotiable, it would be likely to defraud others, before it reached him. (40)

And though the object were general, to defraud whoever might take the instrument; and the particular intention of defrauding the person who would have to pay it, if genuine, never entered into the prisoner's contemplation. (40)

An intent to defraud a body politic or corporate is equally criminal with an intent to defraud an individual. (41)

And where the forgery would defraud a banking copartnership of more than six, carrying on business under the provisions of 7 Geo. 4. c. 46., the intent may be laid to have been to injure or defraud any one of the public officers, nominated as the act directs, of such copartnership. (42)

Where the forgery is by alteration, the indictment may charge that the prisoner forged the altered instrument (43); or that he altered by forging: for, altering is forging. (44)

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(38) See Rex v. Hawkeswood, antè, p. 87.
(39) See Rex v. Teague, antè, p. 604.
(40) Rex v. Mazagora, Pasch. 1815. On indictment for disposing of forged bank notes, the intent was charged to be to defraud the bank: the jury stated that the intent was to defraud whoever might take the notes, but that the intention of defrauding the bank in particular did not enter into the prisoner's contemplation, and they found the prisoner guilty. On case, the judges thought it too clear for discussion; that the prisoner must be taken to have intended to defraud the bank, and that the conviction was right.
(41) See 45 Geo. 3. c. 89. antè, p. 602.
(42) 7 Geo. 4. c. 46. s. 9.
(43) See Rex v. Teague, antè, p. 604.
(44) See Rex v. Elsworth, antè, p. 604.

And discharging one endorsement, and inserting another, may be charged as altering the endorsement. (45)

If the bill or note omit the word pounds in the body, but have an £ prefixed to figures denoting amount in the margin, it may be described as a bill or note for payment of that amount. (46)

The indictment must set out the bill or note in the very words: it is not sufficient to set out the substance. (47)

And if the bill or note contain figures, the indictment must follow it in that respect. (48)

And if the bill or note be in a foreign language, a translation of it must be set out, that it may appear upon the record, in a language the courts understand, that it is what the law considers a bill or note. (49)

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(45) See Rex v. Birkitt, antè, p. 604.

(46) See Rex v. Eliot, antè, p. 611.

(47) Rex v. Mason, Pasch. 1793. Indictment stated that the prisoners, having in their possession a bill of exchange purporting to be drawn by J. S. on J. N., thereby requiring J. N., two months after date, to pay A. B. or order, 91*l.*, and purporting to have been *endorsed by* A. B., together with a forged acceptance, written on the *same bill*, and purporting to have been written by the said J. N., feloniously did utter, &c. Thompson B. saved the question, whether the indictment ought not to have set out the bill and acceptance in their words and figures: the judges held it ought, and that for want thereof it was bad.

Note. It would not otherwise appear on the record whether the bill was what the law considers a bill. [S. P. State v. Gustin, 2 South. R. 744.]

[But see Commonwealth v. Ross, 2 Mass. R. 373. An indictment for uttering a forged promissory note did not set forth the words of the note, nor the date, nor the time when it was payable. The attorney-general said, that the reason why the note was not more particularly described, was that the defendant when arrested swallowed the note, and thus put it out of the power of the government to give a more particular description. The indictment was held sufficient.

An indictment for forging bank notes, instead of setting out the tenor of the notes, "for greater certainty as to their identity," referred to them as being annexed to the indictment, and they actually were annexed. It was held, that although this was a careless and irregular mode of declaring, yet that after verdict for the Commonwealth the irregularity was cured by the statute of jeofails. Commonwealth v. Ervin, 2 Virg. Cases, 337.]

(48) See Rex v. Powell, post, p. 615.

(49) Rex v. Goldstein, Michaelmas, 1821. The prisoner was convicted under 43 Geo. 3. c. 139. of forging a note purporting to be a note of the king of Prussia: the note was in the German language, and was set out verbatim: the indictment did not set out any English transla-

Alleging that the prisoner forged a bill or note "as follows," or that he had a bill or note "as follows," implies, that what follows is in the very words of the bill or note, and makes it necessary to prove the bill or note verbatim. (50)

On an indictment for forging a bill or note with a false name ascribed to the prisoner's mark, the words ascribing the name to the mark, if written in the prisoner's presence, may be described as part of the bill or note. (51)

If the false signature contain an initial only for the Christian name, it is not necessary to aver what Christian name it means. (52)

The indictment ought not to describe the bill or note *as signed* by the person whose name is supposed to have been forged; such an allegation is inconsistent with the charge of forgery, and makes the indictment bad. (53)

And an indictment must not describe a bill or note as having

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tion of it, and on that account an application was made to arrest the judgment: the point was saved for the consideration of the twelve judges; they directed it to be argued, and after argument, the opinion of the majority was, that a translation ought to have been set out upon the indictment; for, it might be a question whether the instrument was within the statute; a court of error ought to have the means of deciding upon that point; to give them those means, they ought to have the instrument before them in a language they understand, and unless they had a translation sanctioned by the jury which tried the indictment, they had no means of getting a translation upon which they could judicially rely: the judgment was arrested.

(50) Rex v. Powell, Michaelmas, 1771. Indictment against prisoner for forging a stock receipt with intent to defraud, 1st, Taylor Barrow, and, 2dly, T. Sykes. The indictment stated that the prisoner forged a certain receipt as follows, viz. &c. The receipt, as set out, contained certain sums in figures, and it was signed T. Barrow. Three objections: 1st, That this was not equivalent to setting out the tenor; but, the judges held it was, and that any variance would be fatal: 2dly, That the sums should not have been set out in figures; but, the judges held the receipt must be pursued literatim, or it would be a variance; and, 3dly, That it should have been averred that T. Barrow, as signed, meant Taylor Barrow; but, the judges thought not, and prisoner was executed.

(51) See Rex v. Dunn, ante, p. 607.

(52) See Rex v. Powell, supra.

(53) Rex v. Carter, Hil. 1801. An indictment, for forging and uttering a bill in Hutchinson's name, described it as signed by Hutchinson; and after conviction, the judges held it bad upon the face of it and that the prisoner might be indicted de novo.

a purport different from what appears upon the face of the instrument. (54)

[On an indictment upon Mass. St. 1804 c. 120. s. 2., for possessing not less than ten *similar* counterfeit bank bills with intent to pass them, evidence of bills differing in their date only is not a variance. (*c*)

On an indictment for forging the endorsement of a payee, it is not necessary to show, by the drawer or maker, who was intended as payee; if there be proof that the prisoner has himself admitted who it was. (55)

[In an indictment for forging a bank note, where an intent to defraud an individual is set forth, it is not necessary to allege the existence of the bank of which it purports to be a note. (*d*)

An indictment charging that a forgery of bank notes was committed, with intent to injure "divers good citizens of the Commonwealth and others to the jurors unknown," without

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(54) Rex v. Reading, Hil. 1794. East, 981. Upon a bill directed to John Ring, there was an acceptance in the name of *John King*. The indictment described the bill as purporting to be directed *to* John King by the name of John Ring; and after conviction *for* forging and uttering, the judges held this a repugnant and absurd description, for the bill could only purport to be what it appeared upon the face of it to be; and the judgment was arrested.

S. P. Rex v. Gilchrist, East, 982; and see Rex v. Jones, Dougl. 302. East, 883.

[(*c*) Commonwealth v. Whitmarsh, 4 Pick. 233.]

(55) Rex v. Downs, Michaelmas, 1789. Indictments for forging the payee's endorsement on a bill, payable to John Sowerby or order; when prisoner passed the bill, he said Sowerby was a cheesemonger at Liverpool, and John Sowerby of Liverpool, cheesemonger, was called; who proved that there was no other cheesemonger at Liverpool of that name but himself, and that the endorsement was not his; there were letters from prisoner after his apprehension, implying guilt generally in this transaction. It was urged, that the drawer should have been called to prove what John Sowerby he meant; but Wilson J. left the case as it was to the jury, who convicted: and on a case reserved, the judges thought the evidence sufficient to go to the jury, and that the conviction was right.

[(*d*) Commonwealth v. Carey, 2 Pick. 47. In the same case, the indictment described the note as a promissory note of the Merchants' Bank in Providence, and it was was objected that it should have been called a bank bill; but the Court held the indictment sufficient. Parker C. J. said, "We consider it to have been expressly decided, that the note of a bank is a promissory note as much as the note of an individual." See also Brown v. Commonwealth, 8 Mass. R. 64.]

setting out an intent to injure the bank, or any person or corporation by name, is good after verdict. (*e*)

An indictment charging that the prisoner willingly acted and assisted in falsely making and forging, &c., without naming any person assisted; that he caused the notes to be passed, without setting out whom he caused to pass the same, or to whom; that the notes were passed to W. S. with intent to defraud W. S. *and others;* that he caused them to be passed or exchanged was held good after verdict. (*f*)]

To support a charge of forgery by subscribing a fictitious name, there must be evidence on the part of the prosecution that that is not the party's real name. (56)

And if there be no evidence to show affirmatively what the real name is, there ought to be proof that it was assumed for the transaction in question (56);

Or for a system of which that was part. (56)

But if there be affirmative proof of the real name, it is for the prisoner to show a prior independent use of the assumed name. (56)

And in such case an absence of proof, on the part of the prosecution, of the name by which the prisoner has passed for several years will not be material. (56)

On an indictment for uttering, proof that the prisoner had in his possession other bills or notes ejusdem generis is admissible; because, if unexplained, it tends to show that he knew the bill or note in question was a forgery. (57)

And bills on the same house with a bill in question, importing to be drawn by persons not known at that house, will be deemed ejusdem generis with the bill in question. (57)

[(*e*) Commonwealth v. Ervin, 2 Va. Cases, 337.]

[(*f*) Commonwealth v. Ervin, 2 Va. Cases, 337.]

(56) See Rex v. Peacock, antè, p. 607.

(57) Rex v. Hough, Michaelmas, 1806. Indictment for uttering a forged bill, purporting to be drawn by Hastings on Esdailes, and proof that no such person as Hastings kept cash at Esdailes': when the prisoner was apprehended, which was four months after the uttering, there were found upon him two other bills, importing to be drawn by Walters on Esdaile, and another, importing to be drawn by Newman on Esdaile; and evidence was given that no such person as Walters or Newman kept cash at Esdailes': Sutton B. allowed these bills to

And proof that the prisoner had pointed out where bills or notes ejusdem generis were hidden, is admissible; because, if unexplained, it raises a presumption that he had them in his possession, and had hidden them. (58)

So, proof that he had uttered other bills or notes ejusdem generis is also admissible. (59)

But such bills or notes must be produced, and their being forgeries, proved. (60)

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be read as evidence that prisoner knew the bill he uttered to be forged: and after conviction the judges thought it right.

(58) Rex v. Rowley, Pasch. 1806. Waring, a person employed by the solicitor to the bank, applied to the prisoner, who twice procured him forged bank notes: he applied a third time; prisoner went out, and after some time returned, and told Waring they were in an old shoe, in a particular lane; they went together, and prisoner threw a stone into a bush, and said, there they are: Waring found the shoe there, and the notes in it: the prisoner was indicted, on 45 Geo. 3. c. 89. § 6., for having these notes in his possession, and Graham B. told the jury that if prisoner had the notes in his possession on their passage to the shoe it was sufficient, and they convicted prisoner: the judges held the conviction right.

(59) Rex v. Wylie, 1 New Rep. 92. Upon an indictment *for uttering* a forged bank note, knowing, &c. the uttering was proved, and its being forged; and to prove the knowledge, evidence was offered that the prisoner had passed other forged notes: this was objected to, on the ground that it was evidence of other felonies, and the prisoner could not be prepared to resist it; but Lord Ellenborough, Heath J. and Thompson B., held it admissible, and the prisoner was found guilty.

Rex v. Ball, Michaelmas, 1807, P. C. 1 Campb. 324. P. C. On indictment for uttering a forged bank note, evidence was given that, three months before, prisoner had passed another note, forged in the same manner, namely, with a camel-hair pencil, by the same hand, and with the same materials, and that fifteen other notes of the same fabrication had been found filed at the bank with the prisoner's writing thereon: point saved, whether the evidence was admissible: all the judges, except Chambre J., thought it was, though its weight would depend on the number of notes issued, and the time, and the probability, from the prisoner's situation in life, of his taking them in business.

See Rex v. Hough, antè, p. 617.

(60) Rex v. Millard, Pasch. 1813. The prisoner was tried for uttering a 5*l.* bank note, and to prove the guilty knowledge evidence was received that he had before uttered two 1*l.* Leicester notes; that in about a fortnight, one having been objected to as bad, he changed it, and that when under charge for the uttering in question, the other was brought to him with the word "forged" upon it, and he changed that; but neither of these bills were produced, nor had any notice been given for producing them: on case, the judges held that this evi-

Proof that the prisoner took them back and changed them with the word "forged" written thereon, is not sufficient. (60)

And evidence may be given of the prisoner's conduct on such other utterrings, and that he passed by different names. (61)

But other evidence to impeach his conduct on those occasions is not admissible; because he cannot be expected to be ready to meet it. (62)

Proof that the prisoner had uttered other forged bills or notes of a different kind has been thought questionable; but such evidence is now continually admitted: for, though there may be a considerable difference between the genuine bills of different houses, the forgeries upon many of them probably come from the same hand; and showing that a man has uttered forged notes of different descriptions raises a presumption that he is in the habit of procuring forged notes, and that he had the criminal knowledge the indictment imputes to him.

On indictments for forgery, the person whose name was forged, or upon whose genuine name a forgery was committed, was heretofore, in many instances, deemed an incompetent witness to prove the forgery, upon the ground of his having an interest in the destruction of the instrument supposed to be forged.

But the law is now altered by 9 Geo. 4. c. 32. s. 2., and such person is, in all cases, deemed a competent witness. (63)

[In Massachusetts, on an indictment for uttering a counter-

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dence should not have been admitted, without proper proof that these notes were forged; and without deciding whether bills of a different description and denomination were admissible (Le Blanc J. thought they were), an application for a pardon was recommended.

(61) See Rex v. Millard, antè, p. 618.

(62) Rex v. Ward, O. B. September, 1818. Prisoner was indicted for uttering, in the name of Ward, a forged 1*l.* note. Evidence was offered that shortly before she had paid away a similar forged note in the name of Sharp: it was insisted that, though it was competent to prove that she had uttered similar notes, it was not competent to show that she uttered them under a different name; because, she could not be prepared to meet that transaction. Graham B., Bayley and Burrough Js. thought the whole of the prisoner's conduct when she uttered the former note admissible, but they seemed to think that evidence to impeach that conduct, and thereby to raise an inference of guilt was not admissible; because, the prisoner could not be expected to meet that evidence, and it would introduce the trial of a distinct case.

(63) By 9 Geo. 4. c. 32. s. 1, 2, "Whereas it is expedient that in prose-

feit note of a bank of another State, the forgery was allowed to be proved by two witnesses who had received and paid out notes purporting to be made by such bank, and one of whom had carried a large number of such notes to the bank, which were all paid by the bank as genuine; but neither of whom had ever seen the president or cashier write. (*g*)

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cutions for forgery the party interested should be rendered a competent witness; be it enacted, That on any prosecution by indictment or information, either at common law or by virtue of any statute, against any person for forging any deed, writing, instrument, or other matter whatsoever; or for uttering or disposing of any deed, &c. knowing the same to be forged; or for being accessory, before or after the fact, to any such offence, if the same be a felony; or for aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor; no person shall be deemed to be an incompetent witness in support of any such prosecution by reason of any interest which such person may have or be supposed to have in respect of such deed, writing, instrument or other matter."

[(*g*) Commonwealth v. Carey, 2 Pick. 47. In this case the bank, though out of the State, was within forty miles of the place of trial. A statute of the State authorizes the dispensing with the evidence of the president and cashier where the bank is more than forty miles from the place of trial. St. Mass. st. 1818, c. 110.]

ADDENDA.

Some of the points of the following cases do not come appropriately under any of the author's divisions; a few of the cases were overlooked in arranging the notes of the work.

A judgment recovered against one of the joint makers of a note, in an action for money lent, it being the same sum for which the note was given, the other makers being only sureties, is no bar to an action against the makers of the note. Bank of Chenango v. Hyde, 4 Cowen, 567.

It seems that partners are liable on a note to a bonâ fide holder, given by one of them subsequently to the dissolution, although sufficient time had not elapsed when the note was issued, to give public nôtice of the dissolution. Bristol v. Sprague, 8 Wend. 423.

A note payable to bearer, made in England, is under statute 3 & 4 Anne, c. 9, transferable by delivery in a foreign country. De la Chaumette v. Bank of England, 2 B. & Adol. 385.

A note being endorsed as follows: "I assign the within to A., and guaranty the solvency of the maker," it was held that the endorser was under the same liability as under an ordinary endorsement, besides being a guarantor of the maker's solvency, and accordingly that he could make no defence, on the ground of delay and negligence to enforce payment of the maker, that could not be made under a general endorsement. Bell v. Johnson, 4 Yerger, 194.

An assignment of a note received by a maker, has been held to be *ipso facto* an assignment of the mortgage. Paine v. French, 4 Hamm. 318.

the note by giving a new note signed by himself and endorsed by another person—A. may sue B. for money paid without showing that he has taken up his own note. Cornwall v. Gould, 4 Pick. 444.

If the endorser of the new note should pay it, he would have no right of action against B., as he did not endorse the note at B.'s request, and B. had made no promise to indemnify him. Cornwall v. Gould, 4 Pick. 444.

Where A. makes a note payable to B., on which C. endorses his name, in an action by B. against C. as a maker of the note, the admissions of A. are not admissible against C., for A. is himself a competent witness. Baker v. Briggs, 8 Pick. 122.

A person who sees the maker of a note sign it, has no right, at another time, to subscribe his name as a witness to the note, without the consent or knowledge of the maker; and therefore his thus subsequently putting his name as a witness, will not bring the note within the exception in the Massachusetts Statute of limitations, (St. 1786, c. 52, s. 5), which exempts promissory notes attested by a witness from its operation. Smith v. Dunham, 8 Pick. 246.

A note was signed by the maker in presence of the payee's attorney, who had previously written on it the word "*witness*," intending to subscribe it himself as a witness. But he did not inform the maker of this intention, and accidentally neglected to put his name on as a witness while the maker was present. Two or three hours afterwards he subscribed his name as a witness, the maker not being present, and not knowing or consenting to his so subscribing, and then delivered the note to the payee. Held that the note was not so witnessed as to avoid the statute of limitations. Ib.

But it *seems* that the attorney having acted without any fraudulent intent, his thus signing as a witness was not such an alteration as would render the note void. Ib.

A promissory note given by the maker A. and accepted by the payee B., in satisfaction of a debt due to the payee from C., and with his consent, is a discharge of the debt; and A. can recover the amount in a suit against C., though he has not paid his own note. M'Lellan v. Crofton, 6 Greenl. 307.

It has been held that bank bills can be attached and seized and sold on execution. Spencer v. Blaisdell, 4 N. Hamp. R. 198.

In Louisiana a person's interest in a note may be sold on execution. Brown v. Anderson, 16 Martin, 416.

Where the payee of a note which ought to have been returned by him to the maker, transferred it to a third person, who sued the maker upon it and recovered judgment against him, it was held that the maker might bring trover against the payee and recover the amount of the note. Buck v. Kent, 3 Verm. R. 99.

Bank notes are not cash. Therefore a debtor of a bank cannot bring notes of the bank into court in satisfaction of a judgment and execution obtained by the bank against him. Coxe v. State Bank, 3 Halst. R. 172.

In an action on a bill or note, if the defendant be defaulted or judgment given against him on demurrer, the damages may be assessed by a jury. Tannehill v. Thomas, 1 Ind. R. 144.

In Indiana in an action of debt by the assignee against the maker of a note, a special plea denying the assignment is bad on general demurrer, as the defence might be proved under the general issue. Bates v. Hunt, 1 Ind. R. 87; Scribner v. Bullitt, 1 Ind. R. 112.

If A., the payee of a bill accepted by B. for his accommodation, endorse it to C. as security for a debt, and C., after the debt is paid, passes it for value to another person, who recovers on the bill against B., B. may recover the amount he has paid in an action against C. for money paid to his use, but not the costs of the suit against B. Bleaden v. Charles, 7 Bing. 246; S. C. 5 M. & P. 14. S. C.

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